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The Utilization of Minority and Women-Owned Business Enterprises by Member Agencies of the Regional Transit Association

Prepared for

THE REGIONAL TRANSIT ASSOCIATION OF
THE SAN FRANCISCO BAY AREA

Prepared by

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ACKNOWLEDGEMENTS

This study could not have been accomplished without the generous assistance of a number of officials and employees of the various RTA agencies who made themselves and their files available to us during the project. We express our appreciation to the following agency personnel: Ms. Candice A. Gonzalez, Ms. PJ. Pickens, Mr. Arnold W. Baker, Mr. Andy T. Flores, Ms. Alberta O. Grant, Mr. Edwin Kung, Ms. Janet Madrigal, Ms. Sandra L. Privett, Mr. Chris Iglesias, Mr. Carl Kennedy and Mr. Wayne Wong.

Dr. David S. Evans of National Economic Research Associates, Inc. (NERA) was the project director for this study. He was assisted by the following NERA staff: Ms. Miriam Oh, Mr. Michael Mazzeo, Mr. Sandeep Manchanda and Mr. Jonathan Falk. Dr. Mark Berkman and Ms. Drew Claxton of NERA, David Burman, Esq. of Perkins Coie, John Harrison of Harrison Taylor & Bazile, and Nereyda Bottoms and Reba Smallwood, Esq. of META, Inc. were principal investigators for various portions of the study. They were assisted by Bruce Brooks and James Rasband of Perkins Coie and Patrick Lawler of Harrison Taylor & Bazile.

We, of course, bear sole responsibility for the opinions expressed and conclusions reached in this report.

EXECUTIVE SUMMARY

A. Introduction and Summary of Findings

The Regional Transit Association (RTA), a consortium of the seven largest transit systems serving the San Francisco Bay Area, has expressed its commitment to provide disadvantaged business enterprises (DBEs) the maximum opportunity to compete for and participate in the performance of all contracts and subcontracts awarded by the RTA. These RTA member agencies include: Alameda/Contra Costa Transit District (AC Transit), San Francisco Bay Area Rapid Transit District (BART), Central Contra Costa Transit Authority (CCCTA), Golden Gate Bridge, Highway and Transportation District (GGBH&TD), San Francisco Municipal Railway (MUNI), San Mateo County Transit District (SAMTRANS) and the Santa Clara County Transportation District (SCCTA). As recipients of federal funds, the member agencies are required to comply with federal statutes and regulations promulgated by the U.S. Department of Transportation for procurements that are funded in whole, or in part, by federal dollars. Henceforth, each member agency has instituted a DBE program for federally funded procurements since the early 1980s. And until recently, the agencies had extended their programs to cover nonfederally (i.e., locally) funded procurements. DBEs are almost all minority-owned business enterprises (MBEs) or women-owned business enterprises (WBEs).

Over the past several years, the laws regarding these kinds of affirmative action programs have changed. In January 1989, the Supreme Court in City of Richmond v. J.A. Croson Co. set constitutional limits on the use of race conscious programs by nonfederal

entities. The Court found that race-based preferences would be constitutionally valid only if there is evidence that discrimination in the marketplace has caused the underutilization of minority-owned firms and that race-based preferences are necessary to remedy that discrimination. In addition, the Court also held that race-conscious remedies must be narrowly tailored to remedy such discrimination.

As of this writing, MBE preferences that are not federally mandated are viewed less favorably by the Court than MBE preferences that are federally mandated. Race-based (or MBE) preferences are also viewed less favorably than gender-based (or WBE) preferences. In legal terms, the Court applies "strict scrutiny" to race-based preferences adopted by nonfederal entities, and applies "intermediate scrutiny" to gender-based preferences and federally mandated race-based preferences. Thus, the Croson decision raises the greatest concern for those parts of an agency's program that provide preferences to MBEs on projects that are not federally funded and, therefore, not subject to federally mandated requirements.

Due to these concerns, the RTA Board of Control commissioned National Economic Research Associates, Inc. (NERA) to evaluate the DBE programs followed by the member agencies in light of the Croson decision and related affirmative action cases. To do so, NERA investigated the utilization of M/WBEs by the private sector within the geographic market areas relevant to RTA procurements, and gathered anecdotal evidence of discriminatory treatment and procurement practices experienced by M/WBEs in the greater Bay Area. For this study, we focused on M/WBEs, as opposed to the broader definition of "DBE" set forth by the Federal Transit Administration (FTA), for two reasons. First,

"mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong."

Compelling governmental interest may be established by making a *prima facie* showing that identifiable discrimination has occurred within the local industry affected by the program. In Croson, the Court stated that an inference of discrimination arises from a "significant disparity between the number of willing and able minority contractors and the number of such contractors actually engaged by the locality or locality's prime contractors." In calculating statistical disparity, "precise calculations of statistical significance" are probably not required. The public entity simply must demonstrate "a firm basis" for concluding that affirmative action is warranted.

In addition to statistical evidence of disparity, the courts have weighed heavily anecdotal evidence of discrimination. In Croson, the Court stated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that race-conscious remedial relief is justified." Subsequently, in Coral Construction Company v. King County, the Ninth Circuit endorsed this approach, stating that "a combination of convincing anecdotal and statistical evidence is potent."

The second prong of the "strict scrutiny" test requires that race-conscious remedies be narrowly tailored to effectuate their purpose. The Court has identified several factors that should be considered in determining whether a race-conscious program is narrowly tailored. In Coral Construction—the leading case at this point—the Ninth Circuit summarized these factors as follows:

virtually all DBEs are minorities or women-owned businesses, since minorities and women are considered disadvantaged presumptively. And, since most M/WBEs are smaller than the maximum size levels specified by the FTA, almost all M/WBEs are also DBEs. Thus, the population of DBEs is essentially identical to the population of M/WBEs. Second, the U.S. Census Bureau—the source of data for much of this study—does not collect data on DBEs, thereby making it impossible to conduct the type of statistical study required by the Supreme Court; however, there are plentiful government data on M/WBEs.

1. Legal Standards

In Croson, the Supreme Court concluded that Richmond's program, which required City construction contractors to subcontract—or set-aside—30 percent of the total dollar value of their work to minority-owned firms, violated the Fourteenth Amendment of the U.S. Constitution. The Court found that race-based classifications by a local government would be constitutionally permissible only if the local government demonstrates a "compelling governmental interest" and shows that its remedy is "narrowly tailored." A compelling governmental interest and a narrowly tailored remedy are the two prongs of the Court's "strict scrutiny test."

According to the Court, a municipality has a compelling interest in remedying not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this prong of strict scrutiny review." The

First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. The second characteristic of a narrowly-tailored program is the use of minority utilization goals set on a case-by-case basis, rather than upon a system of rigid numerical quotas. Finally, an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction.

2. Study Methodology

The methodology NERA adopted for this study was guided by: (1) the criteria for constitutionally permissible affirmative action programs set forth in Croson and related decisions, (2) generally accepted economic and statistical methods for establishing discrimination, and (3) the particular circumstances of each of the RTA member agencies. We identified the geographic market areas from which the agencies procure the preponderance of their goods and services and then examined whether M/WBEs have been discriminated against within these areas. We examined evidence of discrimination against African Americans, Hispanics, Asians (including Native Americans) and women. Our definition of discrimination conforms to that used in employment discrimination litigation—the disparate treatment of similarly situated individuals because of race or gender and the disparate impact of racially neutral practices on members of different race or gender groups. Our definition of discrimination does not include disparate impact that arises from the present effects of historical discrimination such as school segregation.

We examined both statistical and anecdotal evidence of discrimination. For the statistical analysis, it is necessary to examine whether M/WBEs would be underutilized in the absence of any affirmative action efforts or M/WBE goals. It was not feasible to examine RTA procurements since the member agencies have had DBE programs since the

early 1980s that applied to almost all of their procurements. In the absence of reliable agency-specific information, we based our analysis on two other sources of evidence:

- Disparity studies, conducted by NERA, for Alameda County, Contra Costa County, and the City of Hayward. These are three public agencies, located within the RTA's jurisdiction, which have issued procurements without affirmative action programs in recent years and whose geographic and procurement markets coincide with those of the RTA member agencies.

- M/WBE utilization in the private sector where procurement decisions are generally not affected by M/WBE goals. This information was collected from Census and survey data.

For both sources, we compared the estimates of M/WBE utilization (i.e., the percent of procurement awarded to M/WBEs) to M/WBE availability (i.e., the percent of all firms, located within the relevant geographic market areas, that are owned by M/WBEs).

For the anecdotal analysis, we examined:

- The results of mail surveys received from 502 M/WBEs in the Bay Area.

- Detailed questionnaires, completed by agency officials, concerning contracting and purchasing practices.

- Telephone interviews with minority and women-owners of firms in the industries relevant to the RTA's major procurement categories—construction, professional and other services, and commodity purchasing.

- Testimony presented at the four public hearings conducted by the RTA.

- Testimony presented at other public hearings, conducted within the last three years, for other Bay Area entities.

- Social science literature and government studies on race and gender discrimination.

- Court filings and decisions on race and gender discrimination in the Bay Area.

- Legal decisions concerning affirmative action programs.

3. Key Findings

The statistical and anecdotal findings indicate that discrimination would lead to the underutilization of M/WBEs by the RTA member agencies in the absence of a goals program. The statistical evidence indicates substantial underutilization of M/WBEs for the two sources of evidence that we examined. In general, for Alameda, Contra Costa and Hayward we found that those agencies used fewer M/WBEs than we would expect based on the availability of M/WBEs in the geographic areas relevant to their procurements. For our private-sector analysis, we found that M/WBEs received a substantially smaller share of private-sector procurement dollars than we would expect given their availability in the geographic areas relevant to RTA procurements. Anecdotal evidence provides additional support for our finding that marketplace discrimination within the Bay Area limits the opportunity for M/WBEs to obtain work. The DBE programs operated by the agencies are, therefore, a reasonable remedy for ensuring that procurement spending by the RTA member agencies is not used to help perpetuate discriminatory practices. Were the RTA member agencies' programs discontinued, we would expect that the agencies would also underutilize M/WBEs. The remainder of this executive summary describes the basis for our findings in more detail.

B. Statistical Analysis

1. Determination of the RTA's Geographic Procurement Markets

To determine the geographic markets from which each RTA member agency draws contractors, we identified and examined the location of firms that received awards from the agency. Starting with the county in which the agency is located as the central point (e.g., Alameda County for BART and Santa Clara County for SCCTA), we summed the percent of dollars paid to date. We added contiguous counties (in order of proximity to the agency) until 75 percent of the agency's procurement dollars paid to date was accounted for. We chose the 75-percent region because this percentage is often used in antitrust litigation as a rough guide to the geographic extent of the market. Our analysis indicated that the geographic market area for agency construction procurements is predominantly within the Bay Area. The geographic markets for services and commodity purchasing vary greatly across the agencies and sometimes fall outside California.

2. Utilization Analysis

One of the major purposes of our analysis was to determine whether M/WBE participation on RTA procurements was limited because of discrimination. We could not analyze RTA utilization because the member agencies have had DBE programs in effect since the early 1980s.[1] In order to assess the limitations placed on M/WBE participation due to discrimination, we examined M/WBE utilization by Alameda County, Contra Costa County and the City of Hayward (which is located in Alameda County)—all public agencies

[1]Several agencies — GGBH&TD, SamTrans and CCCTA — did suspend their goals-based race conscious programs for locally funded projects following the Croson decision. There was not sufficient contracting activity in the post-Croson period, however, to conduct a statistically reliable disparity analysis.

within the RTA's service area—that have undertaken procurements that were not subject to M/WBE goals during at least some period of time since 1985. We conducted the analysis for three major procurement categories: construction, professional and other services, and commodity purchasing. These are the categories relevant to RTA procurements as well.

We also estimated M/WBE utilization in the private sector which, by and large, does not maintain M/WBE goal programs. We restricted our private-sector utilization analysis to those industries and geographic areas relevant to the RTA's procurement practices. We developed our estimates based on several different sources: (1) NERA's M/WBE mail surveys, (2) the 1987 Census of Construction Industries, Census of Wholesale Trade and Census of Service Industries, and (3) the 1987 Census of Minority and Woman-Owned Businesses. We calculated M/WBE utilization for the three major industry groups for which reliable assignments of procurement categories could be made: construction, professional and other services, and commodity purchasing. For each of these industry groups, we calculated the percent of contracts and payments that were received by the four major M/WBE groups, as defined by the U.S. Census Bureau and in accordance with FTA regulations: African Americans, Hispanics, Asians and other minorities (including Native Americans), and women.

3. Availability

To develop estimates of M/WBE availability, we used the Census of Minority and Women-Owned Businesses and County Business Patterns data to estimate the percent of all firms within the geographic market areas that are owned by minorities and women for each RTA member agency. Although we did not adjust our estimates for detailed firm

qualifications, we did restrict our measure to firms with at least one employee besides the owner. Firms without paid employees are often part-time businesses that would be unlikely to be in a position to perform most public-sector work due to the bonding, insurance and other financial requirements commanded in the public sector.

Our methodology for calculating M/WBE availability has at least three advantages. First, this method was used by the State of Ohio in developing its program which was affirmed in Ohio Contractors Assn. v. Keip, a lower court decision that was cited, without disapproval, by Justice O'Connor. Second, our estimates are based on available data sources. Third, the percent of businesses owned by minorities and women is not as underinclusive as an analysis that focuses on "similarly situated" businesses in terms of revenue, size and experience. That is, this measure does not consider as unavailable M/WBEs that, possibly because of discrimination, have not attained the same qualifications as majority firms.

4. Disparity Results

The statistics gathered as part of our study are striking. For the public-sector procurements that we analyzed, we found that M/WBEs were substantially underutilized by Alameda County, Contra Costa County and the City of Hayward. In general, M/WBEs received a substantially smaller share of contracts and contract dollars in construction (as prime contractors and subcontractors), professional services, and purchasing. For the private sector, we found substantial underutilization of M/WBEs within the geographic market areas and industries from which the RTA agencies procure goods and services. There are tremendous disparities for each major group (i.e., African Americans, Hispanics, Asians

(including Native Americans) and women) in each of the major industries we examined (i.e., construction, professional and other services, and commodity purchasing). In no case did any group receive their expected share of private-sector procurement dollars. These disparities, however, vary greatly for each M/WBE group and across each agency. In general, women-owned construction firms in private-sector subcontracting fared better than the M/WBE groups in any other industry, although substantial disparities still existed for them. Women-owned firms received almost their expected share of construction subcontracting dollars in MUNI's private-sector market; however, they received less than one-third of their expected share in SCCTA's private-sector market. Overall, the most substantial underutilization was for African American commodity vendors—they received less than 3.5 cents of every procurement dollar that we would have expected them to receive in purchasing. African Americans were also the most substantially underutilized group as construction prime contractors in the private sector.

C. Anecdotal Findings of Discrimination

Having found substantial disparities in the private sector, we examined whether discriminatory practices contributed to these disparities rather than their being caused solely by cultural differences or the long-lived effects of past societal discrimination. The courts have traditionally identified two different types of discrimination. "Disparate treatment" involves intentional race or gender discrimination. An example of disparate treatment is where a white man is hired over a more qualified woman. "Disparate impact" involves practices that are "fair in form but discriminatory in practice." An example of disparate impact is the use of an educational requirement that is less likely to be possessed by

Hispanics than by whites, and which has no bearing on job performance. Disparate treatment and disparate impact can take place at any point in the process of establishing or expanding a business.

The results of our anecdotal study show that discrimination is prevalent in the Bay Area. Although the state of California and the Bay Area have a diverse ethnic population and enjoy the reputation as a progressive region, they are not free of racial prejudice. Racial tensions and redlining continue to plague the region. Reports of racial tension outbursts and discrimination on the part of financial institutions and real estate agencies frequently appear in the news. In addition, recent court cases found that discrimination has existed in the Bay Area for a number of years.

Given these findings of discriminatory treatment, it is not surprising that M/WBEs claim that they are subject to numerous instances of disparate treatment. The information obtained from the public hearings, personal interviews and mail surveys supports the contention that discrimination has had an impact on virtually every aspect of an M/WBE's daily business dealings. The witnesses at the hearings testified to various problems they had suffered as minority or women-owned businesses, including discrimination in general, obtaining bonding and financing, trying to break into established business networks, dealings with unions, and the "sham" nature of so-called "good faith" efforts. The following examples are illustrative:

> An African American electrical contractor testified that he was the only minority contractor working on a job for the Valley Medical Center in San Jose [and] was only there as part of a minority goal. Two days after he started on the job, someone had marked the portable bathrooms with "Nigger get out of here. We don't need you here."

The CEO for a minority construction firm specializing in general engineering and building stated that he had white workers tell him, "I just don't work for black people."

An Asian American woman who was an electrical contractor testified to having experienced sexual harassment on the job. Of one job, she testified: "When I walk by, extremely gross, vulgar sexual remarks were made about me. It made it such that I would refuse to go work on the job site where I didn't have my foreman or one of my workers nearby because I was afraid to be anywhere by myself." She also testified that one of her frustrations was that people often assumed that she was merely a "front" for a husband or a white male.

An Asian-Indian owner of an engineering consulting firm testified that promising contract prospects would often evaporate when he visited the contractor and the contractor saw that he was a minority individual.

Another man, an African American representative of a organization of African American electrician journeymen, testified that his organization was formed in an effort to provide an outlet for minority individuals to bring grievances and have some representation in the union. He testified there was a lot of hostility towards African Americans inside the unions.

An African American proprietor of a painting, waterproofing and sandblasting business testified to his difficulty in obtaining liability insurance due to the fact that his business is located in a predominantly minority area: "If you were in a predominantly black area, don't care what city, where it's at, your insurance is going to automatically be higher than anyplace else."

The woman owner of a construction safety supply company testified that she had used her husband to call people for loans and bonding because he could get things accomplished that she couldn't since he was a white male. She testified that people assume that her husband controls the business rather than her.

A Pacific Islander woman who ran a trucking business described receiving numerous "good faith letters" requesting her to solicit bids when the prime actually had no intention of using her on the project. She also described prime contractors who had listed her company for certain jobs and then refused to use her company once the job started, finding some excuse like she did not have the right equipment.

The executive director of Oakland Community Housing also described the problem of majority contractors listing minority subcontractors in their bids

and then failing to use them on the project. He said that to combat this, his organization has threatened to pull the contracts.

A Filipino owner of a construction company said that he receives calls from general contractors who simply ask him what his address is so that they can make a record that they have attempted to contact minority-owned businesses. He also regularly receives certified mail from general contractors. When he signs the certified mail, the general contractor is able to use that to show that they have made a good faith effort, despite the fact that there is no real intention of using him on the project.

The mail surveys conducted for this study also support these findings of discrimination, as well as demonstrate that they carry over to specific areas of discrimination that are relevant to M/WBEs. For all industries combined, 36.9 percent of the M/WBE respondents stated that they had been discriminated against in the course of business dealings. Among the minority groups, African Americans report the most severe experiences of discrimination. Overall, approximately 60 percent of African American MBEs, over one-third of Hispanic MBEs, a quarter of Asian MBEs and approximately 40 percent of all women-owned firms that responded to the question said that they had experienced discrimination. The pattern of discrimination varies greatly for each group across the three separate procurement categories. For example, African Americans report the most frequent instances of discrimination in construction (83 percent), while Hispanics report the most problems in professional services (47.2 percent) and women in purchasing (46.8 percent).

D. Evaluation of DBE Programs of RTA Member Agencies

Our study supports a decision to consider methods of increasing utilization of M/WBEs in public contracting. The statistical evidence suggests that if the agencies were

to discontinue their DBE programs. M/WBE utilization would decrease substantially. The goal programs operated by each agency are, therefore, a reasonable remedy for ensuring that RTA procurement spending is not used to help perpetuate discriminatory practices. Set forth below are some of the issues that should be considered in implementing a new program or revising the current program.

The combination of statistical evidence considered as a whole with the anecdotal evidence is strongly suggestive of discrimination against all three minority groups and women in the various procurement areas. However, from our past studies for agencies with DBE programs similar to those operated by the RTA agencies, we have reason to believe that the agencies utilize certain minority groups more, and others less, than we would expect in certain procurement areas. In those instances where certain groups receive a disproportionate share of the benefits of the goals, the agencies may want to review the administration of their DBE program to ensure that all groups are being given an equal opportunity to participate in the program.

While the statistics divide MBEs into three separate categories, we believe race and ethnic groups may be combined for purposes of an overall MBE goal. The overall goal, however, should not include groups for whom there is no evidence of discrimination or demographic presence.

In Coral Construction, the Ninth Circuit held that participation in a race-conscious contracting program should be limited to firms that are located in or actively do business in the jurisdiction. This principle was recently reaffirmed in Associated General Contractors, Inc. v. Coalition for Economic Equity, where the court upheld the district

court's denial of the AGC's motion preliminarily to enjoin the City and County of San Francisco's latest preference program. Thus, the programs operated by each agency should be limited to firms that are located within the particular agency's geographic procurement area, or that show that they have actively done or attempted to do business with the agency or other entities in that area.

Where a few M/WBEs satisfy a large share of an agency's utilization goals, other—generally smaller and newer—firms cannot enjoy the same opportunities. It is true of both M/WBEs and non-M/WBEs alike that a few firms are often the most aggressive and successful in seeking work on public projects, and a firm presumably cannot continually maintain a dominant share of such a competitive market unless it is better or more dedicated than its competitors. Discouraging such qualities might not be in the RTA member agencies' interest, but a graduation or size limit provision should be considered, because these firms may no longer need a race-conscious remedy. Such a size limitation has been viewed favorably by courts analyzing the narrow-tailoring prong of the constitutional issue. The RTA could also ensure broader participation by encouraging prime contractors to involve more than one or two M/WBE subcontractors when the multiple specialties required for a particular project make this feasible. This would reduce the tendency to rely heavily on a few M/WBEs.

Croson, Coral Construction and Associated General Contractors all indicate that a provision should be made for the waiver or reduction of the general utilization goals in particular contracting situations. These situations are those that would result or have resulted in unjustifiably high subcontractor bids, other unusual burdens on nonfavored

contractors, or on the RTA member agencies. Factors typically considered include the feasibility of the goals under the circumstances, the existence of qualified M/WBEs, and the competitiveness of M/WBE prices.

In conclusion, the DBE programs operated by the RTA member agencies—the current programs or the ones suspended following Croson— are clearly distinguishable from the program condemned by the Court in Croson. First, the RTA agency programs are based on substantial statistical and anecdotal evidence as required by the Court. Second, the programs provide the degree of flexibility through, for example, the provision of waivers that the Court found necessary. A thorough reevaluation of the DBE programs probably should not be necessary for another decade. The RTA agencies may want to consider a 10-year sunset provision in the program for projects without federal funding. Moreover, much of RTA member agencies' contracting is subject to federally mandated DBE goals which appear to be permissible under the Fullilove decision.

CHAPTER 1
INTRODUCTION

The Regional Transit Association (RTA) was formed in 1977 by a joint exercise of powers agreement among the seven largest transit systems in the San Francisco Bay Area to share information and undertake cooperative projects of mutual benefit to its members and the transit riding public. The agencies that comprise the RTA are: Alameda/Contra Costa Transit District (AC Transit), San Francisco Bay Area Rapid Transit District (BART), Central Contra Costa Transit Authority (CCCTA), Golden Gate Bridge, Highway & Transportation District (GGBH&TD), San Francisco Municipal Railway (MUNI), San Mateo County Transit

District (SAMTRANS), and Santa Clara County Transit District (SCCTA).[1] The agencies work cooperatively to form a regional transit network through the use of interconnected transit routes, joint transit facilities, joint procurement, planning, marketing, etc. Together, the agencies provide transportation services to the greater Bay Area[2] which had a 1990 population of approximately 5.6 million people.[3]

The governing body of the RTA is the Board of Control, which is composed of the General Managers from each of the seven agencies. The RTA Board of Control is responsible for handling minority affairs, DBE and affirmative action issues, among many other regional issues. This study was commissioned through the auspices of the RTA for the reasons and concerns set forth below.

With the millions of dollars spent on procurements each year—over $460 million combined for the period under examination[4]—the RTA agencies have profound effects on the economy of the Bay Area. The agencies are a tremendous source of business opportunities for the thousands of firms located in the Bay Area. By virtue of their spending patterns, the

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[1] The Santa Clara County Transit District (SCCTD) is a member of the RTA. However, SCCTD's contracting services are administered by SCCTA. The data provided by SCCTA for this study apply to both agencies. We will, therefore, use the designation "SCCTA" for the sake of clarity.

[2] For the purposes of this report, we will define the greater Bay Area as those counties serviced by the RTA member agencies. These counties are: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara and Sonoma.

[3] Bureau of the Census, Census of Population and Housing, (1990).

[4] Depending on the availability of data, the period under examination differs for each agency. The relevant study period for each agency is the following: AC Transit — FY90-91 and FY91-92; BART — FY90-91 and FY 91-92 for purchasing and services and July 1988 to March 1993 for construction; CCCTA — FY90-91 and FY91-92; MUNI — FY90-91 and FY91-92; SCCTA — 1990-1992; GGBH&TD — FY90-91 and 91-92; and SAMTRANS — FY90-91 and FY 91-92. Fiscal years are from July to June, except for MUNI, which is from October to September.

agencies directly and indirectly help maintain hundreds of businesses and may even foster the creation of new ones. Recognizing this, the agencies have an interest not only in obtaining the most competitive prices for the goods and services they procure, but also in ensuring that the monies spent are distributed in a nondiscriminatory manner.

Since the early 1980s, each agency has implemented a DBE program to ensure that all socially and economically disadvantaged businesses[5] have the maximum opportunity to participate in agency procurements that are funded in whole, or in part, by federal dollars. The agencies extended the federally mandated program requirements to cover their nonfederally (i.e., locally) funded procurements as well, until the 1989 Supreme Court decision in City of Richmond v. J.A. Croson Co.[6] As a result of the decision, several of the agencies suspended setting goals for their locally funded procurements while others have modified their programs.

In Croson, the Court set constitutional limits on the use of race and gender-conscious programs by nonfederal entities. The Court concluded that Richmond's program, which required City construction contractors to subcontract—or set-aside—30 percent of the total dollar value of their work to minority-owned firms, violated the Fourteenth Amendment of the U.S. Constitution. The Court found that race-based classifications by a local government would be constitutionally permissible only if the local government demonstrates that the use of the classifications is justified by a compelling governmental interest to remedy racial

[5] Disadvantaged businesses are generally considered to be small businesses owned and controlled by minorities and women. Thus, we will refer to such business enterprises as M/WBEs throughout the remainder of this report.

[6] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

A. The Standards Used to Determine The Constitutional Validity of Race and Gender-Conscious Affirmative Action Programs

The discussion that follows sets forth the judicial tests that the courts are using to determine the constitutional validity of affirmative action programs aimed at increasing the participation of minority and women-owned businesses in public contracting. The discussion draws on decisions of the U.S. Supreme Court and several U.S. Circuit Courts of Appeal.

The Supreme Court has issued several opinions indicating that race-conscious or gender-conscious affirmative action programs are constitutionally permissible where justified and crafted with sufficient precision.[9] These decisions have consistently emphasized, however, that the courts must use "heightened scrutiny" when called upon to determine whether race or gender-conscious affirmative action programs of states and municipalities violate the Equal Protection Clause of the Fourteenth Amendment.

Race-based preferences are particularly subject to scrutiny.[10] In Wygant, a plurality of the Court concluded that race-conscious affirmative action programs of municipalities must be evaluated using the judicial test known as "strict scrutiny."[11] This test consists of two prongs: (1) whether the racial classification at issue is justified by a "compelling governmental

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[9] E.g., United States v. Montgomery County Board of Education, 395 U.S. 225 (1969); University of California Regents v. Bakke, 438 U.S. 265 (1978); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); City of Richmond v. J.A. Croson County, 488 U.S. 469 (1989).

[10] E.g., Bakke, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.) "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

[11] The "strict scrutiny" test is not applied to gender classifications. The Court has consistently used the less strict "intermediate" level of scrutiny to examine gender classifications. See Craig v. Boren, 429 U.S. 190 (1976). The "intermediate" level of scrutiny requires classifications, such as gender, to be "substantially related" to the achievement of "important" government objectives. Because gender-conscious programs that satisfy the "strict scrutiny" standard of review necessarily satisfy the "intermediate" level of scrutiny, our analysis focuses on the "strict scrutiny" standard.

interest" and (2) whether the means chosen by the state or municipality are narrowly tailored to effectuate that interest.[12] In its Croson decision, a majority of the Court applied the standard of review set forth in Wygant to a minority set-aside program adopted by a municipality.[13] The various factors that the courts have considered when determining whether the prongs of the "strict scrutiny" test have been satisfied are discussed below.

1. Compelling Governmental Interest

In Croson, a majority of the Supreme Court described the circumstances in which a race-conscious remedy could properly be adopted. According to the Court, a municipality has a compelling interest in remedying not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program.[14] To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this prong of

[12] In Wygant, the Court concluded that the race-conscious layoff plan adopted by the Jackson Board of Education violated the Equal Protection Clause because it was not justified by a compelling governmental interest. The Court emphasized the Board's failure to show that it had in any way discriminated against African American teachers who were the beneficiaries of the layoff plan.

[13] The Croson Court concluded that the City of Richmond's 30 percent set-aside for minority contractors was invalid because the plan did not satisfy either prong of the "strict scrutiny" test. The Court's opinion ruled that Richmond had not shown: (1) that the race-conscious elements of the plan were justified by evidence of racial discrimination or (2) that race-conscious measures were needed to remedy the problems that prevented minority contractors in Richmond from receiving a greater share of the dollars expended by that City to procure goods and services.

[14] See 488 U.S. at 491-92 (plurality opinion of O'Connor, J., with Rehnquist, C.J. and White, J.); at 537-38 (Marshall, J., with Brennan, and Blackmun, JJ., dissenting).

strict scrutiny review."[15] The "mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong."[16]

The governmental body proposing the affirmative action program may establish a compelling interest by making a *prima facie* showing that identifiable discrimination has occurred within the local industry affected by the program. In Croson, the Court stated that an inference of discrimination arises from a "significant disparity between the number of willing and able minority contractors and the number of such contractors actually engaged by the locality or locality's prime contractors."[17] In calculating statistical disparity, "precise calculations of statistical significance" probably are not required. The public entity simply must demonstrate "a firm basis" for concluding that affirmative action is warranted.[18]

In addition to statistical evidence of disparity, the courts have weighed heavily anecdotal evidence of discrimination. In Croson, the Court stated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that race-conscious remedial relief is justified."[19] Subsequently, in Coral Construction, the Ninth Circuit endorsed this approach, stating that "a combination of convincing anecdotal and statistical evidence is potent."[20]

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[15] Coral Construction Company v. King County, 941 F. 2d 910, 916 (9th Cir. 1991).

[16] Ibid.

[17] 488 U.S. at 509.

[18] Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977); see Wygant, 476 U.S. at 292-93 (O'Connor, J., concurring).

[19] 488 U.S. at 509.

[20] 941 F.2d at 919. See also Associated General Contractors, Inc. v. Coalition for Economic Equity, (1991) U.S. App. LEXIS 28489 (9th Cir. 1991) (concluding same).

2. Narrowly Tailored Remedy

The second prong of the "strict scrutiny" test requires that race-conscious remedies be narrowly tailored to effectuate their purpose. The Court has identified several factors that should be considered in determining whether a race-conscious program is narrowly tailored.[21] In Coral Construction, the Ninth Circuit summarized these factors as follows:

> First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. The second characteristic of a narrowly-tailored program is the use of minority utilization goals set on a case-by-case basis, rather than upon a system of rigid numerical quotas. Finally, an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction.[22]

Municipalities are required to undertake good faith consideration of race-neutral measures. In Croson, the Court listed several race-neutral alternatives it considered important. These included: (1) simplification of bidding procedures, (2) relaxation of bonding requirements, (3) banning discrimination in the provision of bonding by banks or of credit by local suppliers and (4) provision of training and financial aid for disadvantaged firms.[23]

As to the second factor—flexibility in administering the race-conscious program—the Court has indicated that it is important to determine whether the municipality is attempting to enforce a rigid quota.[24] In examining this issue, courts following Croson have considered whether race-conscious programs incorporate: (1) case-by-case utilization goals, (2) a waiver

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[21] Wygant, 476 U.S. at 274; Croson 488 U.S. 507-508.

[22] 941 F. 2d at 932 [citations omitted]. See also Associated General Contractors, 1991 U.S. App. LEXIS 28489 (following and reiterating the narrow-tailoring factors discussed in Coral Construction).

[23] 486 U.S. at 507.

[24] Croson, 488 U.S. at 507-08.

provision that accounts for both the unavailability of qualified minority contractors and the failure of qualified minority contractors to submit competitive price quotes and (3) a sunset clause providing definitive end dates.[25]

Third, the Court has considered whether a race-conscious program is limited in geographical scope to the boundaries of the enacting jurisdiction.[26] Applying this factor, the Ninth Circuit has said that race-conscious plans should be designed to benefit only those minority contractors that have in some way been victimized by discrimination in the enacting jurisdiction.[27] In municipalities where the presence of discrimination is shown, it appears that the courts will permit a rebuttable presumption that minority contractors that have done business or attempted to do business in the enacting jurisdiction are the victims of discrimination.[28]

B. Study Methodology

The methodology NERA adopted for this study was guided by the criteria for constitutionally permissible affirmative action programs set forth in Croson and other decisions, generally accepted economic and statistical methods for establishing discrimination, and the particular circumstances of each of the RTA member agencies. We focused on the geographic areas from which the agencies procure the preponderance of their goods and services. This focus is necessary to ensure that any evidence of discrimination is specific to the

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[25] E.g., Coral Construction, 941 F. 2d at 924.

[26] Croson, 499 U.S. at 508-09.

[27] Coral Construction, 941 F.2d at 922.

[28] Id. at 925.

particular circumstances of each agency and to develop the narrowly tailored remedies desired by the Court. We identified the geographic market area for each agency from the agency's procurement records.

We then examined whether M/WBEs have been discriminated against in the relevant geographic areas. We examined evidence of discrimination against the following race and gender groups: African Americans, Hispanics, Asians (including Native Americans) and women.[29] Our definition of discrimination conforms to that used in employment discrimination litigation—the disparate treatment of similarly situated individuals because of race or gender, and the disparate impact of racially neutral practices on members of different race or gender groups.[30] Our definition of discrimination does not include disparate impact that arises from the present effects of historical discrimination such as school segregation.

We examined both statistical and anecdotal evidence of discrimination. For the statistical analysis, we determined whether M/WBEs would be underutilized in the absence of any affirmative action efforts or M/WBE goals. We used two separate methods in our analysis. First, several public agencies in the Bay Area procure goods and services from geographic and procurement markets that are similar to those of the RTA member agencies.

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[29] Hispanics are an ethnic group and belong to many different race groups including Caucasian and African American. For brevity, we use the term race to include race and ethnicity. For the purpose of examining statistical evidence of discrimination against Native Americans, we include Native Americans in the category of "Asians and other minorities" as defined in the Census of Minority-Owned Businesses (see Chapter 3). Because of the demographic presence of Native Americans in the Bay area — (about 1 percent of the population in the counties defined as the greater Bay Area are Native Americans according to the 1990 Census) and our knowledge of the existence of Native American firms who have been certified to do work for Bay Area agencies with M/WBE programs, we conclude that statistical evidence of discrimination against Asians which presented in the study includes discrimination against Native Americans.

[30] See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Griggs v. Duke Power Co., 401 U.S. 424 (1971).

We have completed studies of M/WBE utilization for Alameda County, Contra Costa County and the City of Hayward, which is located in Alameda County.[31] These public agencies have conducted procurements without M/WBE affirmative action programs in recent years. They therefore provide useful information on what the race and gender composition of the procurement by RTA member agencies would be in the absence of the current DBE programs. Second, we compared the percent of dollars received by M/WBEs in the private sector (where procurement decisions are generally not affected by M/WBE goals or requirements) to the utilization of M/WBEs that we would expect absent discrimination. In simpler terms, we compared M/WBE utilization to M/WBE availability in the private sector.

We assumed that, in the absence of discrimination, the percent of dollars received by M/WBEs would equal the percent of establishments owned and operated by minorities or women in the relevant industries and geographic market areas.[32] We considered only establishments with at least one employee in addition to the owner, because single-person establishments are unlikely to be qualified for most public-sector work.[33] We based our estimates of M/WBE availability primarily upon 1987 Census data, which provides information on the number of M/WBEs in the counties from which the RTA agencies procure goods and services. We then adjusted for estimated increases between 1987 and 1990. We

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[31] We have also conducted studies for the San Francisco Redevelopment Agency. This Agency, however, has issued few procurements that were not subject to goal requirements in recent years.

[32] We discuss our reasons for this assumption in more detail in Chapter 4.

[33] While single-person establishments certainly would not be capable of performing public sector work in construction and purchasing, it is conceivable that a single-person professional service provider could do work for one of the agencies. However, since we believe that this would be the exception rather than the rule, we have included only establishments with at least one paid employee to be qualified to do the work.

examined the existence of disparities for each race and gender group by major procurement category: construction, professional and other services, and commodity purchasing.[34] We note that this measure of M/WBE availability does not adjust for the possibility that more M/WBEs would exist but for discrimination. Thus, we provide separate estimates of M/WBE availability in the absence of discrimination.

In addition to determining whether M/WBEs are currently underutilized in the private sector, we collected evidence of the extent and sources of discrimination from mail surveys, detailed personal interviews with M/WBE owners, four public hearings held by the RTA for the purposes of this study, results of hearings conducted by NERA for other Bay Area entities, published studies of discrimination, and federal court cases. This evidence was used for determining whether discrimination was the likely cause for the underutilization of M/WBEs.

C. Overview of the Report

This report consists of seven chapters, including this introduction. Chapter 2 presents an overview of the RTA's procurement programs. Chapters 3 and 4 contain our statistical analyses. Chapter 3 summarizes the availability of M/WBEs in the relevant geographic market areas for each agency and within the relevant private sector. Chapter 4 reports our estimates of the percent of private-sector dollars that were received by M/WBEs and then examines whether disparities exist between the utilization and availability of M/WBEs in the private sector. Chapter 5 reports the results of our examination of what the Supreme Court

[34] As we discuss later, the data did not permit us to examine disparities for more narrowly defined industry groups.

refers to as "anecdotal evidence of discrimination." Chapter 6 reviews race-conscious and race-neutral programs to remedy discrimination. Chapter 7 summarizes our findings.

CHAPTER 2
RTA PROCUREMENT PROGRAMS

Public procurement statutes are codified in part to ensure fair, open and competitive bidding. However, obtaining work from the public sector is invariably a more difficult, time-consuming and complex process than in the private sector. In the public sector, successful bidders often face stiffer requirements such as insurance and, in the case of construction, bonding, than are required in the private sector. But it is also a process that, at least ostensibly, is more open than the private sector where long-standing relationships between businesses are hard to make and hard to break. For example, the majority of construction

contracts in the public sector are awarded to the lowest bidder, even one unfamiliar to the public agency that has solicited the bid. Public-sector procurement therefore presents a significant opportunity for young firms that have not yet developed the reputations and relationships that are invaluable in the private sector.

The opportunities and obstacles associated with public-sector procurement are magnified for minority and women-owned firms that may be victims of discrimination. For example, it may appear less likely that discrimination would preclude M/WBE construction firms from obtaining public-sector work than from obtaining private-sector work because awards to the lowest bidder are ostensibly color blind. But discrimination may raise the costs to M/WBEs and thereby make it more difficult for them to submit low bids. For example, public-sector requirements (e.g., bonding) can be difficult for M/WBE firms to meet due to societal discrimination which reduced the accumulation of wealth by minorities. Contemporary private-sector discrimination continues to make it difficult for M/WBEs to obtain bonding and financing, as we discuss further in Chapter 5.

The extent to which public-sector procurement presents opportunities or obstacles, especially for M/WBE firms, depends largely upon federal, state and local procurement laws and agency regulations. M/WBEs are also affected by various affirmative action efforts that public-sector agencies may undertake. These comments are especially true of the RTA agencies, where the millions of dollars spent each year for procurements provide tremendous business opportunities, as well as significant obstacles due to the complexity of the particular procurement rules and practices followed by each agency, for M/WBEs and non-M/WBEs alike. Federal, state and local laws provide the general guidelines for the procurement

practices followed by each of the seven transit authorities that comprise the RTA. However, under these guidelines, each agency still retains considerable discretion over the size and scope of procurements, how to publicize a bid request, and the time available for bid preparation. Together, these laws dictate the procedures that must be followed in soliciting and evaluating bids, as well as the minimum requirements winning bids must satisfy.

This chapter reviews applicable federal, state and local procurement laws that the RTA agencies followed during the years relevant to this study. It also reviews the affirmative action efforts undertaken by each of the agencies to increase M/WBE participation. The information presented was collected from each agency's responses to NERA's procurement surveys; interviews with agency procurement, contracting and DBE officials; and responses to NERA's M/WBE program surveys. We also reviewed all written policies, procedures and file memoranda that were provided to us by the agencies.

In Section A, we describe the major federal, state and local laws that govern the agencies' procurement practices and the specific procurement practices followed by each of the agencies. In Section B, we discuss the race/gender-conscious efforts undertaken by each of the agencies to increase M/WBE participation on both federally funded and nonfederally funded procurements. In the last section, we review the race/gender-neutral programs and affirmative action efforts designed to encourage the participation of M/WBEs on agency procurements.

A. Procurement Policies and Practices

As recipients of federal funds, each of the RTA member agencies are required to comply with procurement guidelines established by the Federal Transit Administration (FTA).

formerly the Urban Mass Transportation Administration (UMTA), of the U.S. Department of Transportation (U.S. DOT). These guidelines are basically in compliance with all applicable state and local laws. Therefore, we will focus most of our discussion on the guidelines set forth by the FTA.

Under these guidelines, each agency is required to certify to the FTA that it will abide by the requirements of fundamental procurement principles and applicable laws and regulations for all federally funded procurements. The FTA imposes the following requirements:

- All procurements are to be conducted in a manner that provides full and open competition.
- In-state or local preferences in the evaluation of bids or proposals are prohibited except in those instances where applicable federal statutes mandate or encourage geographic preferences, or where state-licensing laws require them.
- All solicitations must present a clear and accurate written description of the technical requirements and shall not contain features that unduly restrict competition.
- All prequalified lists of vendors must be current and include enough qualified sources to ensure maximum open and free competition; potential bidders may not be precluded from qualifying during the solicitation period.

The guidelines articulate four methods of procurement which may be used by grantees:

1. Small purchase order—Services, supplies or property valued in aggregate at less than $25,000 may be procured through informal procurement methods. Price or rate quotations must be obtained from an adequate number of qualified sources.

2. Sealed bid—Bids are to be formally advertised and a firm fixed-price contract must be awarded to the lowest responsive and responsible bidder. Bids must be advertised in a manner that yield an adequate number of bidders with sufficient time to respond.

3. Competitive proposal—When conditions are not conducive to a sealed bid (i.e., clear specifications do not exist and/or price is also not clearly determined), a Request For

Proposals (RFP) is to be issued. The solicitation must specify all evaluation factors and their relative importance. A written procedure must be in place for conducting technical evaluations and for the selection of awardees. An award is to be made to the firm whose proposal is deemed most advantageous to the grantee. Grantees must use competitive proposal procedures for qualifications-based procurements of architectural, engineering and related services.

4. Sole-source (noncompetitive) procurement—A sole source procurement can be made only in an emergency, when the item(s) is available from only a single source, where no competitive advantage can be gained through competitive bidding, or under other very narrowly defined circumstances.

A review of the each of the RTA member agencies' procurement policies and procedures indicated that they are in compliance with federal guidelines. We will now discuss the particular methods of award by major procurement category (i.e., construction, purchasing and professional services) used by each of the agencies.

1. Construction

In construction, there is little variation in the method of awarding contracts. All agencies, as required by federal, state and local law, use competitive sealed bids. In addition, BART uses competitive sealed proposals. All agencies are required to award contracts—after full and open competition—to the lowest responsive and responsible bidder. Only in emergency situations or when there is only a single provider is an agency allowed to authorize the negotiation of a contract without competition (i.e., sole source).

Competitive sealed bids are generally initiated through an Invitation For Bid (IFB). The agencies use a number of methods to advertise IFBs and to identify and recruit potential bidders. The most common avenues of solicitation are through general circulation newspapers, trade papers/journals, trade organizations, and minority and/or women business organizations. Specifications are written in such a manner that they are not unduly restrictive.

All of the agencies require bid bonds amounting to between 5 and 10 percent of the contract price. The agencies also require performance bonds and payment bonds in the amount of 100 percent for construction contracts under $25,000.[35] Bond requirements are sometimes waived by SCCTA for contracts under $50,000 and by BART when judged to be an unnecessary expense to the District and if permitted by law. There are also a variety of insurance requirements that bidders must meet, such as comprehensive general liability, worker's compensation, automobile, contractor's equipment and/or special hazards insurance; the specific requirements vary among the agencies. Table 2.1 reports the bonding and insurance requirements of each agency.

2. Purchasing

The acquisition of all supplies and equipment is handled solely by the purchasing departments for AC Transit, CCCTA, SCCTA and SAMTRANS; the purchasing departments of GGBH&TD and MUNI handle the acquisition of all supplies, equipment and nonprofessional services for all contracts except construction contracts.[36] At BART, this function is handled primarily by the Contract Management Department.

Procurement requests are usually initiated by the individual departments. The majority of purchase orders and contracts are put out for competitive bid. Sole-sourcing is primarily used when only one source is available, in emergencies and/or under special circumstances (e.g., specialty item or service).

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[35] Several of the agencies indicated that they generally do not award contracts under $25,000; however, their policy is to require payment and performance bonds of 100 percent regardless of contract price.

[36] MUNI's purchasing department also handles the acquisition of professional services; however, the RFP process is managed by the requesting department.

Table 2.1

Bonding and Insurance Requirements for Construction Contracts Under $25,000

Agency	Bid Bond	Performance/ Payment Bond	Exceptions	Insurance Requirements
San Francisco Bay Area Rapid Transit District (BART)	10%	100%	Considered an unnecessary expense if permitted by law	comprehensive general liability, automobile liability, workers' compensation, contractor's equipment
Alameda/Contra Costa Transit District (AC Transit)	10%	100%	None	comprehensive general liability, automobile liability, workers' compensation, blanket contract liability, special hazards liability
Central Contra Costa Transit Authority (CCCTA)	10%	100%	None	comprehensive general liability, fire and extended coverage, workers' compensation coverage, automobile liability
Golden Gate Bridge, Highway & Transportation District (GGBH&TD)	10%	100%	Bid bond may be waived on a case by case basis	comprehensive general liability, automobile liability, workers' compensation, employer's liability
San Francisco Municipal Railway (MUNI)	10%	100%	None	comprehensive general liability, comprehensive auto liability, workers' compensation, contractor's equipment, work and materials, environment impairment liability
Santa Clara County Transportation Agency (SCCTA)	10%	100%	Contracts under $50,000	comprehensive general liability, commercial general liability, automobile liability, workers' compensation
San Mateo County Transportation District (SAMTRANS)	10%	100%	Bid bond amount may vary based on assessed risk	comprehensive general liability, automobile liability, workers' compensation, employer's liability
FTA Requirements	**5%**	**100%**	**District bonding policies may be used for contracts exceeding $100,000**	**Subject to state law requirements, all competitively bid contracts must include a broad insurance/indemnification provision**

As stated in the FTA procurement guidelines, small purchase orders may be exempt from formal competitive bids and may be procured through informal procurement methods. The precise definition of a small purchase order differs for each agency depending on the type of procurement (e.g., goods, services or construction items). See Table 2.2. The procedural methods used for such procurements also differ across each agency. The methods used most frequently by the agencies to advertise and identify firms for commodity purchases include: contacting firms that had provided the agency similar commodities in the past, contacting firms that had requested to be placed on a master vendor or bidders list, and advertising in general circulation newspapers.

3. Professional and Other Services

Professional service requests are often initiated when a need is recognized by a department of an agency. In general, the particular agency then issues a Request For Proposals (RFP). Sole-sourcing has been used occasionally by the agencies.[37] The most commonly used methods to solicit firms for professional services include: sending RFPs to firms that had requested one or that had requested to get on a list, advertising in general circulation newspapers, and notifying minority or women business organizations. The length of time between the inception of a procurement need to the issuance of an RFP varies, depending on the complexity of the procurement and the agency involved: this could range anywhere from 2 to 8 weeks for CCCTA to 6 to 8 months for MUNI.

The RFP generally lists certain selection criteria. Work and business experience, insurability, capital, quality controls and staff requirements are usually considered the most

[37] For example, BART used sole-sourcing for less than 5 percent of its professional service procurements. SCCTA used sole-sourcing only in emergencies or for highly specialized fields.

Table 2.2*
Small Purchase Orders Exempt From Formal
Competitive Bid Requirements

Agency	Commodities	Services	Construction
BART	$25,000	N/A	$10,000
AC Transit	$25,000	$10,000	$25,000
CCCTA	$25,000	$25,000	$6,500
GGBH&TD	$20,000	N/A	$5,000
MUNI	$5,000	$5,000	$5,000
SCCTA	$5,000	$10,000	$75,000
SAMTRANS	$10,000	N/A	$10,000

*Note: The dollar figures listed in the table represent the maximum value up to which purchases may be exempt from formal competitive bid.

N/A indicates that procurements in these areas for these agencies are not subject to competitive bids.

important factors in determining a firm's capacity and capability. Unlike construction and purchasing procurements, price may not be the decisive consideration in selecting a firm for a professional services contract.

B. Race/Gender Conscious Procurement Efforts

1. Federally Funded Procurements

As grantees, all RTA member agencies are also required to have written DBE programs that include the establishment of goals for the utilization of DBEs on federally funded procurements. The following are the salient characteristics of a DBE program:

- Participation is limited to small business concerns owned and controlled by socially and economically disadvantaged individuals.
- There are six presumptive groups considered to be socially and economically disadvantaged. They are: African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and women. This presumption is a rebuttable one.
- The enterprise must be at least 51 percent owned and controlled by persons from one or more of the socially and economically disadvantaged groups.
- The enterprise must be a small concern (as determined by Section 8(a) of the Small Business Act) and must have a valid certification as a socially and economically disadvantaged enterprise.
- On a case-by-case basis, other groups may be found to be socially and economically disadvantaged.
- Overall annual goals and contract-specific goals are set based on the types of procurement opportunities, whether or not subcontracting opportunities exist, the availability of DBEs, past experience and any other relevant factor.
- Proposers and bidders must either meet the established contract-specific goals or demonstrate good faith efforts in order to be deemed "responsive" and therefore eligible for award of the contract.

The Federal program administered by the Federal Transit Administration does not authorize the setting of separate goals for each of the protected groups, but instead requires that a single DBE goal be set.

In addition, the U.S. DOT sponsors a Bonding Assistance Program which is designed to enhance and further the opportunity of DBE firms to obtain bid, performance and payment bonds for transportation-related contracts. This program is administered through the Office of Small and Disadvantaged Business Utilization of the U.S. DOT. DBEs with contracts with any federal, state or local transportation agency are eligible for this service.

2. Locally Funded Procurements

In the early 1980s, each agency implemented a DBE program for nonfederally (i.e., locally) funded procurements that parallels the federal program. Prior to the Croson decision, separate programs were not maintained for federally funded and locally funded procurements, although accounting and goal setting were kept separate as required by the U.S. DOT. Since Croson, CCCTA, GGBH&TD and SAMTRANS have suspended setting goals for their locally funded projects. Only AC Transit, BART and SCCTA have continued to rely on goals in their local programs since the Croson decision.[38] MUNI follows the San Francisco program which has goals for local DBE prime contractors. All of the agencies still encourage DBE participation and continue with extensive outreach efforts. Table 2.3 summarizes some of the key elements of the DBE programs and/or activities maintained by each agency for locally funded procurements.

[38] BART has made several recent changes to its nonfederally funded DBE program to reflect, in part, the preliminary rulings of the Federal District Court in RGW v. San Francisco Bay Area Rapid Transit District, United States District Court, Northern District of California, Docket No. C92-2938-TEH.

Table 2.3
Non-Federally Funded Procurements
Current DBE Programs

Agency	Local Goals-Based Program	Goals set	Good Faith Required	Agency Outreach Efforts
BART	X	X	X	X
AC Transit	X	X	X	X
CCCTA			*	X
GGBH&TD			*	X
MUNI[1]	X		X	X
SCCTA	X	X	X	X
SAMTRANS			*	X

[1] MUNI has goals for local M/WBEs and on prime contracts.

*Although no specific enforceable goal is in place, the Agency encourages good faith efforts to increase M/WBE (DBE) utilization.

Each of the member agencies engage in a variety of efforts to support their federal and/or local DBE programs. These include: outreach, general assistance, monitoring of procurements, certification of firms, participation in the development of the RTA directory of certified DBE firms, assistance in bid preparation, seminars and newsletters, point/premium preferences, and bonding, insurance and financial referrals. In addition, each agency maintains its own bidders/vendors lists which serves to supplement the RTA's directory. The DBE officials of each agency are responsible for updating these lists and making them available to buyers, purchasing agents and contract administrators. Several agencies also advertise solicitations in newspapers targeted to minorities and notify minority business organizations of contracting opportunities. To encourage prime contractors to subcontract with DBEs, prime contractors are required to meet contract-specific subcontracting goals or demonstrate "good faith efforts" that they have attempted to contact and solicit bids from DBEs for federally funded contracts.

Bidders who do not meet DBE contract-specific goals or recommended goals are required to demonstrate that sufficient steps were taken to obtain DBE participation. Efforts that must be documented, at a minimum, include:

- Attendance at pre-bid meetings, if any, scheduled by the agency to inform potential prime contractors and DBEs of subcontracting opportunities.
- Advertisement in general circulation media, trade association publications and minority/female focus media concerning subcontracting opportunities.
- Written notification to a sufficient number of DBEs that their interest in the contract is solicited.
- Efforts made to follow up the initial solicitations of interest by contacting DBEs to determine with certainty whether they are interested.

- Efforts made to select portions of the work proposed to be performed by DBEs in order to increase DBE participation.
- Efforts made to provide interested DBEs with adequate information about plans, specifications and requirements of the contract.
- Efforts made to negotiate in good faith with DBEs and reasons for rejection as unqualified.
- Efforts made to assist interested DBEs in obtaining lines of credit, bonding or insurance required by the contractor or District.
- Efforts made to use the services of available organizations and groups that provide assistance in the recruitment and placement of DBEs.

C. Race/Gender Neutral Alternatives

In the Croson decision, Justice O'Connor listed a number of methods for attacking discrimination that fall short of enacting set-asides. Local governments "would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination." Local governments can also use "race-neutral devices to increase the accessibility of City contracting opportunities to small entrepreneurs of all races." She mentions the "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid" and the "elimination or modification" of formal barriers to new entrants. The Richmond plan was rejected in part because there was no consideration of these kinds of race-neutral methods for increasing minority participation. The lengths to which local governments must consider these alternatives before adopting a race-conscious program is not at all clear. A cursory examination would probably not be enough. A showing that race-neutral methods would not remedy identifiable discrimination probably would be adequate.

Types of race-neutral activities that are faced by M/WBEs, as well as all other businesses alike, include—but are not limited to—the following: lack of contracting information and opportunities, lack of access to purchasing agents and contracting officers, lack of financing and working capital, lack of bonding and insurance capacity, and inadequate management training and education. Our review of the procurement and contracting practices revealed that the RTA agencies have instituted several race/gender-neutral programs and activities to address one or more of these problems. The following is a list of activities implemented by all of the agencies:

- Vendor and procurement fairs are held, and brochures about doing business with the RTA agencies are available at various locations around the state.
- Large projects are divided into smaller projects whenever feasible and legally permissible so as to encourage broader participation by increasing the number of opportunities available and reducing the level of bonding required.
- General assistance is provided to all firms.
- Contracts are advertised in newspapers and trade journals.
- Pre-bid conferences are usually held.

Other types of race/gender-neutral activities that are available to the RTA member agencies and that have been implemented by other surrounding jurisdictions are listed below. In considering their options, the agencies should take legal constraints into account.

- Establishing and operating a telephone hotline to provide resource information to small businesses on topics such as starting a business, financing, small business conferences and seminars, and other topics of special concern for small businesses.
- Providing presentations and educational workshops or seminars that address a variety of business concerns such as obtaining bonding and insurance.

- Reducing the number of sole-source procurements so as to provide more opportunities for all firms.

- Providing insurance, bonding and other financial assistance to small firms.

- Establishing procedures to ensure prompt payment and reducing retainage since many small firms are restricted by cash flow.

The feasibility of using race/gender-neutral remedies as an appropriate alternative to

pal programs for the RTA member agencies is discussed in more detail in Chapter 6.

CHAPTER 3
AVAILABILITY OF M/WBES IN THE RTA GEOGRAPHIC MARKETS

Each of the RTA agencies has adopted a goals program for DBE participation on federally funded procurements. These goals apply to nonfederally funded procurements for the agencies that currently have adopted their own DBE programs for local procurements. The purpose of this chapter is to estimate the availability of DBEs that are tailored to the geographic and procurement markets from which the RTA member agencies procure goods and services. These estimates of availability could be used as a baseline for revising or setting DBE goals on federally and nonfederally funded procurements.

Virtually all DBEs are minority or women-owned businesses since minorities and women are considered disadvantaged presumptively.[39] Almost all M/WBEs are also DBEs since most M/WBEs are smaller than the maximum size levels specified by the FTA's definition of a DBE.[40] Thus, the population of DBEs is essentially identical to the population of M/WBEs. Since there are plentiful sources of government data on M/WBEs, we focus on M/WBEs throughout the remainder of this report.

Section A describes our methodology for estimating M/WBE availability. Section B presents estimates of the current availability of M/WBEs and non-M/WBEs within the relevant geographic and procurement markets for each RTA member agency. Section C presents estimates of the availability of M/WBEs that could be developed over time and that could provide a basis for setting M/WBE goals.

A. Methodology for Measuring Availability

Our estimates of M/WBE availability are designed to be narrowly tailored to the specific procurement practices of each RTA member agency so that they may be used as a basis for setting or revising DBE goals. We consider two specific facts about each agency in our analysis. The first fact concerns which goods and services the agency purchases. In estimating M/WBE availability it is important to recognize that the number of M/WBEs may vary considerably across lines of business. Few M/WBEs may be available in one industry, and many in others. For example, there are relatively more M/WBEs in specialty construction

[39] See Chapter 2 for a list of the racial and ethnic groups that are included in the FTA's definition of DBE.

[40] See Bureau of the Census, Characteristics of Business Owners, 1982, and Census of Minority and Woman-Owned Business Enterprises, 1987.

than in building construction. Agencies that do relatively more specialty construction would be expected to use relatively more M/WBEs than agencies that do relatively more building construction.

The second fact concerns the geographic area from which the agency procures goods and services. The geographic area in which vendors are located may vary greatly depending upon agency practices and the types of goods and services the agency procures. Some agencies may choose to advertise procurements locally, in which case most procurements would probably be from local firms. Other agencies may choose to solicit firms nationally, in which case vendors may come from a much broader, possibly national, area. Some agencies may also procure goods and services that are more likely to be available locally while others may procure specialized items that are made far away. Finally, depending upon the type of work being done, local vendors may have a comparative advantage over nonlocal vendors and as a result the agency may find that most of its bids or proposals are received from local firms. That is common in construction work, where knowledge of local building codes together with the lower cost of transporting heavy construction equipment gives local firms an advantage. It is also often true for professional services, such as law, where knowledge of local customs is important.

To tailor our analysis to the relevant geographic and procurement markets for each agency, we obtained data from each agency on its procurements for the most recent years available. For each procurement, we determined the location of the vendor, the type of work, and the size of the project. Using this information, we determined the goods and services procured by each agency by classifying each procurement by a 2-digit Standard Industrial

Classification (SIC) code: SIC codes are determined by the U.S. Bureau of the Census and are the major classification system for reporting government data. We then calculated the percent of all dollars spent in each 2-digit SIC code. The distribution of dollars across SIC codes was used, as described below, to weight M/WBE availability more heavily in those industries from which the agency procures a relatively large percent of goods and services and to weight M/WBE availability less heavily in those industries from which the agency procures a relatively small percent of goods and services.

We also calculated the percent of dollars, by 2-digit SIC industry that was paid to vendors located in each county throughout the United States.[41] We did this by using agency data on the zip code of each vendor together with data on the county associated with each zip code. We then summed the percent of dollars paid to date starting with the county in which the agency is located as the central point (e.g., Alameda County for BART and Santa Clara County for SCCTA). We added contiguous counties (in order of proximity to the agency) until 75 percent of the agency's procurement dollars paid to date were accounted for.[42] We chose the 75-percent region because this percentage is often used in antitrust litigation as a rough guide to the geographic extent of the market. Our analysis indicates that, with the exception of BART and SCCTA, the 75-percent geographic market for RTA construction procurements

[41] We focused on the county because much of the business availability data discussed below are reported at the county level.

[42] We conducted the availability analysis for each major procurement category using the agency's broadest 75-percent geographic market region. For example, if the agency's broadest 75-percent geographic market was in commodity purchasing, this was the area used in the analysis for construction and professional services as well.

falls within the greater Bay Area.[43] The geographic markets for professional services and commodity purchasing vary greatly across the agencies. For professional service procurements, the 75-percent geographic market generally ranges between 2 and 5 counties with the exception of AC Transit whose geographic market spans 10 counties. The geographic market for commodity purchases varies tremendously, ranging from two counties for AC Transit and BART to outside California for MUNI and SCCTA. The results of our geographic market analysis are reported in Tables 3.1 to 3.3.

We now turn back to our methodology for measuring availability. To be narrowly tailored, estimates of M/WBE availability should reflect the percent of dollars that we would expect M/WBEs to receive in the absence of discrimination. As a baseline for estimating the percent of dollars that we would expect M/WBEs to receive, we used the percent of all firms that are owned by minorities or women. Thus, if there were 100 firms in the specialty construction contracting industry and 10 of these firms were owned by minorities, 10 percent (10/100 = .10) of the specialty construction contractors are MBEs. All else equal, we would expect that roughly 10 percent of agency dollars spent on electrical contractors or subcontractors would be received by minority-owned specialty construction contractors.[44]

Our analysis, which is described more fully in the next section, is based on estimates of the percent of all firms in each 2-digit SIC code industry in each county that are owned and operated by each race or gender group. To estimate the overall availability of M/WBEs for

[43] For BART and SCCTA, only one county (i.e., Solano County and Santa Cruz County, respectively) falls outside the greater Bay Area. As discussed in Chapter 1, the greater Bay Area is defined to include counties served by the RTA member agencies.

[44] We discuss some caveats to this approach in the next section.

Table 3.1
75 Percent Geographic Market for RTA Construction Procurements

County	AC Transit	BART	GGBH&TD	MUNI	SAMTRANS	SCCTA	CCCTA
Alameda	40.94 *	27.22 *	0.56	4.89	--	3.36	--
Contra Costa	52.34	22.65	16.31	--	30.54	--	78.69 *
Marin	--	0.09	50.37	--	--	--	--
Sacramento	--	--	--	--	--	--	--
San Francisco	0.30	5.98	22.40 *	70.45 *	3.25	--	--
San Mateo	--	8.41	--	--	42.75 *	2.02	--
Santa Clara	--	3.96	--	--	8.75	68.22 *	--
Santa Cruz	--	--	--	--	--	2.32	--
Solano	--	5.10	--	--	--	--	--
Sonoma	--	4.15	--	--	--	--	--
TOTAL	**93.58**	**77.56**	**89.63**	**75.35**	**85.28**	**75.92**	**78.69**

* = county in which the agency is located.

Note: This table reports the percent of construction dollars awarded in each county by the RTA member agencies. Firms located closest to the county in which the agency is located generally received the preponderance of the agency's construction procurement dollars. The counties listed in the table represent the San Francisco Oakland San Jose Consolidated MSA, or the Greater Bay Area, and beyond.

Table 3.2

Table 3.2
75 Percent Geographic Market for RTA Professional Service Procurements

County	AC Transit	BART	GGBHT&TD	MUNI	SAMTRANS	SCCTA/SCCTD	CCCTA
Alameda	35.81 *	65.97 *	8.84	2.50	--	12.15	24.49
Butte	--	--	--	--	--	--	--
Contra Costa	2.76	--	--	0.29	--	--	46.47 *
Los Angeles	--	--	--	--	--	--	--
Marin	2.26	--	10.78	1.95	--	--	--
Mendocino	--	--	--	--	--	--	--
Napa	0.16	--	--	--	--	--	--
San Francisco	29.06	14.00	55.90 *	70.58 *	66.09	34.43	8.46
San Joaquin	--	--	--	--	--	--	--
San Mateo	1.18	--	--	--	20.44 *	0.97	--
Santa Clara	3.63	--	--	--	--	41.09 *	--
Santa Cruz	0.47	--	--	-	--	0.11	--
Solano	0.05	--	--	--	--	--	--
Sonoma	0.52	--	--	--	--	--	--
Sacramento	--	--	--	--	--	--	--
Stanislaus	--	--	--	--	--	--	--
Yolo	--	--	--	-	--	--	--
TOTAL	75.90	79.97	75.52	75.32	86.53	88.76	79.42

* = county in which the agency is located.

Note: This table reports the percent of professional service dollars awarded in each county by the RTA member agencies. The 75 percent geographic market was calculated by adding up the percent of dollars awarded in each county (in order of proximity to the agency) until 75 percent of the dollars were accounted for.

Table 3.3
75 Percent Geographic Market for RTA Purchasing Procurements

County	AC Transit	BART	GGBH&TD	MUNI	SAMTRANS	SCCTA/SCCTD	CCCTA
Alameda	5.40 *	22.02 *	12.52	6.39	11.27	7.48	24.31
Contra Costa	--	--	2.68	1.39	0.79	1.49	20.85 *
Fresno	--	--	--	0.05	0.13	0.01	--
Los Angeles	--	--	--	2.24	1.04	22.46	--
Marin	--	--	7.43	0.69	--	0.46	0.01
Monterey	--	--	--	--	--	0.05	--
Napa	--	--	0.70	0.07	--	--	--
Sacramento	--	--	--	0.37	3.78	0.29	--
San Benito	--	--	--	--	--	0.08	--
San Francisco	70.65	56.99	33.36 *	39.24 *	43.91	2.72	19.72
San Joaquin	--	--	--	0.01	--	0.26	--
San Mateo	--	--	11.01	1.82	10.96 *	0.72	11.95
Santa Clara	--	--	3.10	2.05	3.15	28.09 *	--
Santa Cruz	--	--	--	0.02	--	0.84	--
Solano	--	--	0.62	0.13	--	0.30	2.00
Sonoma	--	--	4.98	0.68	--	0.04	--
Stanislaus	--	--	--	0.32	--	0.02	--
Yolo	--	--	--	--	--	0.13	--
Other California	--	--	--	1.17	--	1.37	--
Outside California	--	--	--	43.39	--	33.18	--
TOTAL	**76.05**	**79.01**	**76.41**	**100.00**	**75.02**	**100.00**	**78.84**

* – county in which the agency is located.

Note: This table reports the percent of commodity purchasing dollars awarded in each county by the RTA member agencies. The 75 percent geographic market for commodity purchases extends outside California for MUNI, SAMTRANS and SCCTA.

the three major procurement areas—construction, professional and other services, and purchasing—it was necessary to combine the availability data across the industries that comprise the major procurement areas and across the counties that comprise the geographic market. To do this, we calculated a weighted average of the availability of each race or gender group in the construction industry, where the weights corresponded to the percent of dollars spent in each 2-digit SIC code industry. Estimates were calculated in the same way for services and commodities.

We then calculated the weighted average of the M/WBE availability estimates for the three major procurement areas in each county across all of the counties in the geographic market. As mentioned earlier, firms in more distant counties are less "available" than firms in closer counties. To take this into account, we weighted the availability in each county by the extent to which the agency has done business in that county.[45]

B. Estimates of the Current Availability of M/WBEs

We restricted our measure to firms with at least one employee besides the owner. Firms without employees are often part-time businesses that are unlikely to be in a position to perform most public-sector work due to the bonding, insurance and other financial requirements commanded in the public sector.[46] To calculate the percent of firms with at

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[45] This approach is consistent with procedures commonly used in Title VII cases to estimate the availability of workers in the geographic market. For further discussion, see Walter Connolly, Jr., David W. Peterson and Michael J. Connolly, Use of Statistics in Equal Employment Opportunity Litigation (New York: Law Journal Seminars Press, 1989).

[46] Small businesses report great difficulty in meeting prequalification requirements due to their inability to obtain working capital, bonding and insurance. They are, therefore, precluded from even bidding on most public-sector projects.

least one employee, we need to have estimates of the number of M/WBEs and the number of all firms with at least one employee besides the owner.

We determined the number of M/WBEs from the Census of Minority-Owned Businesses, a government survey that has been conducted in 1972, 1977, 1982 and 1987. In each of these years the Census Bureau has obtained estimates of the number of M/WBEs in various geographic areas and for various industries. To evaluate the usefulness of the Census data, it is important to understand how the Census identifies M/WBEs and how Census methods have changed between 1982 and 1987. The Census identified M/WBEs in 1982 and 1987 by identifying from IRS records all firms that:

(1) Filed a Schedule C with their IRS 1040 for the given tax year. These firms comprise all individual proprietorships or self-employed individuals that reported income to the IRS in that year.

(2) Filed Form 1065 for the given tax year. These firms comprise all partnerships that reported income to the IRS in that year.

(3) Filed a Form 1120S for the tax year. These firms comprise all Subchapter S corporations that reported income to the IRS in that year. A Subchapter S corporation is one that is treated as a partnership for tax purposes.

Each of these tax returns contains the social security number(s) of the individual(s) filing the return (this would be a single individual for Schedule C's, two or more individuals for partnerships and one or more individuals for Subchapter S corporations). The Census uses these social security numbers to identify the race and gender of the corresponding individuals from Social Security Administration records. Until 1981, social security applications requested that individuals identify their race as white, African American or other. The Census identified

Asians, Hispanics and Native Americans from a combination of examining surnames and selective mail surveys.[47,48]

This process excludes individuals who own private corporations that are not organized as Subchapter S corporations since social security numbers are not requested by the IRS from individuals who file Form 1120 corporate tax returns. In 1982 and previous years, the Census attempted to identify M/WBE non-Subchapter S corporations from M/WBE directories and other sources. This process, however, was *ad hoc* and may not have succeeded in counting all M/WBEs. As a result, the Census decided to suspend any attempt to count M/WBEs that file Form 1120 corporate tax returns for the 1987 Census. Another difference between 1982 and 1987 is that the Census counted all firms that reported business receipts greater than zero in 1982 while only counting firms that reported business receipts of $500 or more in 1987. As a result of these changes, the 1982 and 1987 Censuses are not strictly comparable since 1987 excludes (a) non-Subchapter S Corporations and (b) all firms with business receipts of less than $500. The Census has reported 1982 national figures that exclude non-Subchapter S

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[47] For example, in the case of Hispanics, the Census identified firm owners who had indicated their race as Hispanic or Other on the social security application or whose last names corresponded to a master list of Hispanic surnames. The Census then sent a mail survey to a stratified sample of these firms to estimate the number of Hispanic firms. In the case of firms with paid employees, surveys were sent to at least one out of every two firms. A similar approach was taken with Asians.

[48] For the purposes of our availability calculations, we have followed the M/WBE definitions used in the 1987 Census of Minority and Woman-Owned Businesses. According to the Census, an MBE is a business that is at least 50 percent owned and controlled by members of the following groups: African Americans (*i.e.*, persons having origins in any of the Black African racial groups), Hispanics (*i.e.*, Cuban, Mexican, Puerto Rican, Latin American, European Spanish (but not Portuguese), and other Hispanic origins and cultures), Asians and other minorities (*i.e.*, Asian and Pacific Islander, ancestral groups of Asian Indians, Chinese, Japanese, Filipino, Hawaiian, and other Asian or Pacific Islander; and Native American ancestral groups of Aleut, Eskimo and American Indian — thus, Native Americans are included in "Asians and other minorities" by the Census Bureau). According to the Census, a WBE is a business that is at least 50 percent owned and controlled by women.

Corporations and firms with business receipts of less than $500 and are therefore comparable to the 1987 data. These differences have little effect on the number of firms counted by the Census since, in 1982, less than two percent of minority firms were 1120 Corporations or had business receipts of less than $500.

We have obtained unpublished data from the Census on the number of M/WBEs by county and by two-digit SIC code industry for 1987. The most comparable data on the population of all firms were the County Business Patterns data, which reports the number of establishments with paid employees. It should be noted that County Business Pattern data differ from the Census of Minority and Women-Owned Business data in that County Business Patterns counts establishments while Census of Minority and Women-Owned Businesses counts firms. An establishment is a unique physical location of a firm. Larger firms often have several physical locations or establishments where work is carried out. As a practical matter, this distinction is not important since the average number of establishments per firm is very small so that the total number of firms is only slightly smaller than the total number of establishments in most industries. The County Business Patterns data are available yearly and contain information for each county and each industry. Because of errors in the 1987 data tape created by the Census, we used the 1988 data. We estimated the number of M/WBEs in 1990 under the assumption that the growth in M/WBEs between 1987 and 1988 was the same as the annual growth between 1982 and 1987.[49] In addition, we have used growth rates in the percent of M/WBEs between 1982 and 1987 to estimate the percent of M/WBEs in 1990, the year relevant to this study.

[49] Based on each individual race and sex group.

Using the Census of Minority Business data and the County Business Patterns data, we have calculated the percent of all firms with paid employees that are minority or women-owned for each county in each 2-digit SIC code industry and each county. For example, the estimated percent of firms that are African American-owned for each county and industry is given by:

$$A_{a,c,i} = \frac{\text{Number of African American-owned businesses with payroll from Census of Minority Businesses}}{\text{Number of establishments with payroll from County Business Patterns}}$$

where "A" denotes Availability, the subscript "a" denotes African Americans and the subscript "c" denotes the county and "i" denotes the industry.

We calculated the availability figures in exactly the same way for women. However, an adjustment was required for the Hispanic and Asian figures. The methods used by the Census to identify Asian and Hispanic businesses are less precise than those used for African Americans and women for the reasons discussed above. The Census surveyed 73,000 firms to determine their race and ethnicity. As a result of this survey, they estimated that they had missed 19.6 percent of the Hispanic firms with paid employees and 21.4 percent of the Asian firms with paid employees. We therefore increased our availability percentages to account for these undercounts.[50]

[50] See Bureau of the Census, Survey of Minority-Owned Business Enterprises: Hispanics, Appendix D and Survey of Minority-Owned Business Enterprises: Asians, Appendix D, for further discussion. According to unpublished Census data, 20,210 Hispanic firms with payroll were not counted and 82,908 were counted; 26,260 Asian firms with payroll were not counted and 96,457 were counted.

Table 3.4 reports the 1990 estimates of M/WBE availability for the four major race/gender groups (i.e., African Americans, Hispanics, Asians (including Native Americans) and women) by major procurement category (i.e., construction, professional and other services, and commodity purchasing). As shown in the table, the availability of M/WBEs varies greatly across industries and race/gender groups for each agency. These discrepancies are due to the fact that the geographic market areas (at the county level) and industries (at the 2-digit SIC level) from which the agencies procure the preponderance of their goods and services differ for each agency. For example, in construction, African American availability ranges from 0.79 percent for SCCTA to 6.11 percent for MUNI. Hispanic availability ranges from 1.64 percent for GGBH&TD to 10.79 percent for SCCTA, and the availability of women-owned construction firms ranges from 5.73 percent for SCCTA to 18.11 percent for MUNI. There is less variation in the availability of Asian-owned construction firms among the agencies: Asian availability ranges from 1.85 percent for AC Transit to 4.77 percent for BART. In general, however, women-owned firms are the most available to the RTA agencies while African American-owned firms are the least available. In professional services, with the exception of SAMTRANS, women are the most available of all the M/WBE groups.[51] In commodity purchasing, women and/or Asians are the most available to the agencies.

[51] The availability of Hispanic and Asian-owned service firms is exceptionally high for SAMTRANS due to the fact that SAMTRANS procures a large portion of its services from SIC code 41 (i.e., local and interurban passenger transit). The firms in this particular 2-digit SIC industry, located within the counties that comprise SAMTRANS' geographic market area, are predominantly owned by Hispanics and Asians, according to the Census data described earlier.

Table 3.4
Estimated 1990 M/WBE Availability for RTA Agencies

M/WBE Group	AC Transit	BART	GGBH&TD	MUNI	SAMTRANS	SCCTA	CCCTA
Construction							
African American	3.20 %	2.71 %	2.11 %	6.11 %	2.66 %	0.79 %	3.17 %
Hispanic	4.36	5.56	1.64	3.72	8.97	10.79	4.40
Asian	1.85	4.77	3.31	3.54	4.45	4.23	4.17
Total MBEs	9.41	13.04	7.06	13.37	16.08	15.81	11.74
Total WBEs	7.30	6.08	11.53	18.11	8.84	5.73	8.51
Services							
African American	4.31 %	2.35 %	2.55 %	1.99 %	4.46 %	1.26 %	7.82 %
Hispanic	4.18	2.25	3.59	2.52	13.12	1.97	4.46
Asian	12.07	7.55	10.32	12.35	26.87	9.07	13.60
Total MBEs	20.56	12.15	16.46	16.86	44.45	12.30	25.88
Total WBEs	22.82	15.17	22.37	20.56	12.90	10.19	25.41
Purchasing							
African American	5.41 %	0.21 %	1.01 %	0.55 %	0.33 %	0.25 %	0.81 %
Hispanic	5.40	0.78	1.69	1.57	1.60	1.13	1.16
Asian	1.51	8.31	7.40	19.18	5.84	5.75	13.41
Total MBEs	12.32	9.30	10.10	21.30	7.77	7.13	15.38
Total WBEs	12.95	11.27	12.42	13.29	7.64	5.75	10.6

Note: This table reports the dollar weighted estimates of M/WBE availability in 1990 for each agency by major procurement category. These estimates are based on the following sources: (1) procurements/payments database for each agency, (2) 1987 Census of Minority and Women Owned Business Enterprises, and (3) County Business Patterns. Any large discrepancies are due to the fact that these availability figures were restricted to the geographic areas and industries (at the 2 digit SIC level) from which the agency procures the preponderance of its goods and services. The relevant geographic and procurement markets differ greatly across each agency.

C. Estimates of the Availability of MBEs But-For Discrimination

The availability figures reported above represent the minority and women-owned firms that were in existence and that had paid employees during the period under examination. But these figures may be artificially depressed because discrimination may have reduced the supply of minority and women businesses. The evidence presented in Chapter 5 strongly suggests that minorities have been subject to various forms of discrimination that would reduce the supply of minority firms by: (a) deterring some firms from ever starting and (b) expediting the failure of firms that do start.

This section reports the result of our quantification of the extent to which discrimination has depressed the supply of MBEs and our estimates of the availability of MBEs "but-for" discrimination.[52] We use these results to estimate what the availability of MBEs would be at the current time if minorities were not affected by discrimination. To make the discussion easier, we focus on African Americans. Our basic approach to determining potential availability involves two key steps. In the first step, we examine whether there is a difference between the actual rate of African American self-employment and the rate of African American self-employment that we would expect if African Americans were as likely to become self-employed as "similarly situated" whites.[53] To determine whether African Americans and whites are similarly situated we have compared their educational levels.

[52] We have not taken a similar approach for women because the formation of businesses by women over time is linked with their voluntary participation in the workforce. Changes in female labor-force participation over time make it very difficult to discern the extent to which the underrepresentation of female-owned businesses is due to discrimination or the changing role of women in the workforce.

[53] The self-employed include all sole proprietors, all partners, and most owners of small corporations. We restricted our analysis to full-time business owners.

whether or not they are married, their ages, and measures of their financial assets (e.g., whether they own a home, the amount of interest and dividend income reported). We find that African Americans are self-employed at a statistically significantly lower rate than "similarly situated" whites.

We recognize that some of the observed differences between the actual and expected African American self-employment may be attributable to factors that we cannot observe in the data, such as detailed educational levels, training, and background (e.g., family and work) that are conducive to the establishment of businesses. Consequently, on the basis of this analysis alone, we cannot be certain that the difference between the actual and expected rates of African American self-employment is due to discrimination. In the second step of the analysis, we ask whether the underrepresentation of African Americans in self-employment is associated with more or less objective measures of contemporary discrimination. We compare the difference between the actual and expected rate of African American self-employment across metropolitan areas with two measures of discrimination: the ratio of private discrimination suits to total suits; and the ratio of African American hourly wages to white hourly wages. We find that metropolitan areas that have a relatively large proportion of private discrimination suits and a relatively low African American hourly wage, tend to have a relatively large underrepresentation of African Americans in self-employment.

In the third subsection, we show that M/WBEs tend to be smaller than non-M/WBEs. M/WBEs are much less likely to have paid employees than non-M/WBEs. Were discriminatory barriers eliminated, it is likely that many of these smaller M/WBEs could expand and thereby increase the availability of M/WBEs with paid employees.

1. Statistical Analysis of African American vs. White Self-Employment

The source of data for our analysis was the Current Population Surveys (CPS) conducted by the U.S. Bureau of the Census. The CPS contains data on approximately 70,000 households which are surveyed periodically during the year on a rotating basis. We used a snapshot of these households from March of the years included in the analysis. The analysis reported below uses annual CPS data from 1986 to 1990.

For each year, we obtained information on full-time (more than 35 hours per week) workers who lived in metropolitan statistical areas and who were 18 years or older. We also excluded individuals who worked for the public sector. There were approximately 40,000 individuals in each year of CPS data we examined, giving us a total sample of 192,741 individuals. For each of these individuals CPS reports a variety of information including race (white, African American, Hispanic, Asian), whether the individual works for someone else (i.e., a wage worker) or works for herself (i.e., self-employed),[54] and various demographic and economic characteristics. The self-employed include sole proprietors, members of partnerships and owners of small corporations.

We estimated the probability of self-employment for whites using a standard statistical technique for estimating probabilities known as logit analysis. There were 166,922 observations on whites. We assumed that the probability of self-employment depends on demographic characteristics (e.g., male vs. female, married vs. unmarried, age), human capital (education), and the availability of capital that could be used to start a business (e.g., dividend

[54] Some people, of course, have more than one job and could be both wage workers and self-employed. An individual is classified as self-employed for the purposes of this study if he obtains the majority of his earnings from self-employment. Individuals who are self-employed as a second job would not be counted among the self-employed for this purpose.

and interest income, whether the individual owns a home). We also considered three major industries: construction, purchasing, and professional and other services, since the prospects for starting businesses in these industries probably differ.[55] These possible determinants of self-employment were chosen because they correspond to factors that other studies have found to be important and because data are available on them in the CPS.[56] We then performed a logistic regression between whether an individual in our sample was self-employed and these possible determinants of self-employment. We found that all of these possible determinants were highly correlated with whether an individual was self-employed. Consistent with other studies, more highly-educated individuals and persons with greater net worth (proxied by the level of interest and divided income and whether they owned their own home) were more likely to be self-employed.

Our analysis of self-employment for whites gave us a formula—based on the estimated logit regression between whether an individual was self-employed and the possible determinants of self-employment—for the probability that an individual with particular characteristics (education, age, wealth, etc.) would be self-employed. We examined a sample of 18,820 African American individuals drawn from the same CPS data as the white individuals examined above. We used the formula to calculate the likelihood that these African American individuals would be self-employed given their characteristics (education, age, wealth, etc.) These calculations give us the rate of African American self-employment if African Americans

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[55] These industries were chosen because they correspond to the three major groupings used for our utilization and availability analyses.

[56] For example, see David S. Evans and Linda S. Leighton, "Some Empirical Aspects of Entrepreneurship," American Economic Review, June 1989 and the studies cited therein.

were as likely to become self-employed as similarly situated whites (where similarly situated is based on having the same value of education, age, wealth, etc.) We then compared the estimated African American self-employment rate to the actual African American self-employment rate. In all cases, the actual African American self-employment rate was substantially less than the expected self-employment rate based on similarly situated whites. Overall, African Americans had a 3.3 percent self-employment rate, had they been white, our model predicts their self-employment rate at 7 percent—over twice as high. One possible explanation for this disparity is that discrimination reduces the opportunity for African American self-employment.

We calculated the estimated African American self-employment rate as a percent of the actual African American self-employment rate for every metropolitan area and for each major industry—construction, purchasing, and professional services. The more this ratio exceeds 100 percent, the greater is the underrepresentation of African Americans in self-employment after controlling for the factors mentioned above. For example a ratio of 150 percent implies that the estimated African American self-employment rate is 50 percent higher than the actual African American self-employment rate. We did not have a sufficient number of observations to make these comparisons for each of the major industries in the geographic market areas relevant to RTA procurements. National figures, however, show that there are some major differences in actual and potential availability between the major industries. For construction, we found that the estimated African American rate was 77.7 percent more than the actual rate. For professional services, the estimated African American rate was 128.7 percent more than the actual rate. For purchasing, the estimated African American rate was

201.8 percent higher than the actual rate. Thus, on a national basis the largest disparity between actual and potential availability is in commodities. This result is not surprising since federal, state, and local M/WBE programs have, since the mid-1970s, helped stimulate the formation of M/WBEs in construction and, to a lesser extent, professional services. There are limited federal or state goal programs for commodity firms.

We performed similar calculations for Hispanics and Asians on a national basis. For construction, we found that the estimated Hispanic rate was 33.6 percent more than the actual rate; 8.7 percent more for services; and 6.6 percent for commodities. For Asians, actual availability slightly exceeds estimated availability.

These calculations have several limitations. First, the CPS provides fairly limited data on personal characteristics that might be associated with going into self-employment. If there are other important characteristics, and if whites tend to have relatively more of these characteristics than African Americans, the difference between the estimated and actual African American self-employment rates could be due to these characteristics rather than discrimination. Second, it is impossible to determine whether the underrepresentation of African Americans in self-employment is due to contemporary discrimination, the effects of past societal discrimination or cultural differences between ethnic groups. In the next section, however, we present some evidence that the underrepresentation of African Americans in self-employment is correlated with measures of contemporary discrimination. This gives us some indication that the disparities that we have identified are at least partly the result of discrimination.

2. Relationship between Disparities and Discrimination

We obtained data on the number of discrimination suits and total suits for each judicial district. We combined these judicial districts so that they corresponded roughly to metropolitan statistical areas.[57] For each metropolitan area, we then calculated the ratio of discrimination suits to total suits. We limited discrimination suits to private suits since the filing of discrimination suits by public officials is more likely to be affected by political differences across judicial districts. We then examined the correlation between the ratio of estimated and actual self-employment and the ratio of private discrimination suits to all suits across metropolitan statistical areas. We found that there was a statistically significant (significant at the five percent level or better) positive correlation between the extent to which estimated African American self-employment exceeds actual African American self-employment and the proportion of judicial suits that involve claims of private discrimination.

We examined another possible measure of discrimination. We calculated the ratio of the average wage for hourly African American workers to the average wage for hourly white workers for each metropolitan area. We chose hourly workers since they generally require fewer skills and qualifications than salaried workers; therefore, it is more reasonable to attribute disparities between African American and white wages for hourly workers to discrimination. We then examined the correlation between the magnitude of the wage disparity and the magnitude of the underrepresentation of African Americans in self-

[57] It was not possible to assign judicial districts to a unique metropolitan area since the metropolitan boundaries sometimes cut across judicial district boundaries. In these cases, we assigned the judicial district to the metropolitan area that included the majority of the judicial district.

employment. Again, we found a highly statistically significant positive correlation between the two.

3. Comparison of Firm Sizes Across Race/Gender Groups

In the previous two subsections, we have examined the effect of discrimination on the number of businesses operated by minorities. We found that discrimination has suppressed the number of businesses operated by African Americans and, to a much lesser extent, by Hispanics. In this subsection, we show that there is a disparity between the percent of businesses operated by minorities and women and the percent of businesses *with paid employees* operated by minorities and women. Table 3.5 reports the percent of businesses operated by M/WBEs and the percent of businesses with paid employees operated by M/WBEs for each of the major procurement areas and for each of the race/gender groups. These figures are based on national data for 1987 since local data are not available. For example, nationally, MBEs operated 6.6 percent of construction firms but only 5.3 percent of construction firms with paid employees. The disparities between the percent of all firms operated by M/WBEs and the percent of firms with paid employees operated by M/WBEs are especially large for African Americans and women in purchasing— while 2.4 percent of all commodity firms owned by African Americans, only 1.6 percent were firms with paid employees. Women operated 29.2 percent of all commodity firms, but only 20.6 percent of firms with paid employees.

4. Calculating Potential Availability

The analysis described above can be used to estimate the extent to which current actual availability falls short of potential availability for the greater Bay Area. Table 3.6 reports the

Table 3.5

PERCENT OF FIRMS OPERATED BY M/WBES AND PERCENT OF FIRMS WITH PAID EMPLOYEES OPERATED BY M/WBES

Race/Sex Group	Number of Firms With Paid Employees (1)	Total Number of Firms (2)	Percent of M/WBE Firms With Paid Employees (3)	Percent of Total M/WBE Firms (4)	Ratio of % Total M/WBE Firms to % M/WBE Firms With Paid Employees (5) [(4)/(3)]
Construction					
African American	11,081	36,763	1.96%	2.23%	1.135
Hispanic	14,717	55,516	2.60%	3.36%	1.291
Asian	4,165	16,223	0.74%	0.98%	1.333
Total MBEs	29,963	108,502	5.30%	6.57%	1.239
Women	36,178	94,308	6.40%	5.71%	0.892
TOTAL [1]	565,017	1,651,102	N/A	N/A	N/A
Services					
African American	37,464	273,494	2.38%	3.53%	1.482
Hispanic	35,975	233,433	2.28%	3.01%	1.317
Asian	43,193	213,714	2.74%	2.75%	1.001
Total MBEs	116,632	720,641	7.41%	9.29%	1.254
Women	309,100	2,786,156	19.63%	35.92%	1.830
TOTAL [1]	1,574,551	7,757,637	N/A	N/A	N/A
Purchasing					
African American	19,871	87,390	1.57%	2.43%	1.545
Hispanic	29,820	108,349	2.36%	3.02%	1.277
Asian	46,958	127,750	3.72%	3.56%	0.956
Total MBEs	96,649	323,489	7.66%	9.01%	1.176
Women	260,301	1,049,564	20.62%	29.22%	1.417
TOTAL [1]	1,262,094	3,591,707	N/A	N/A	N/A

Note: This table reports the ratio of total M/WBE firms to M/WBE firms with paid employees at the national level. The source of information for this table is the 1987 Census of Minority and Women-Owned Business Enterprises.

N/A: Not applicable.

[1] "TOTAL" is inclusive of white males.

percent by which potential availability exceeds actual availability for each of the three major procurement areas. To estimate potential M/WBE availability, it is first necessary to determine the percent of *all firms* (i.e., with or without paid employees) operated by M/WBEs available to each agency. This is done by multiplying actual availability (reported in Table 3.4) by the corresponding ratio of *all firms* to *firms with paid employees* (reported in Column (5) of Table 3.5).[58] The estimated percent of businesses that would be owned by minorities or women in the absence of discrimination can then be determined by multiplying the resulting figures with the appropriate multipliers which can be derived from the percentages reported in Table 3.6.

[58] By doing this, we are assuming that the ratio of the percent of *all firms* to the percent of *firms with paid employees* operated by M/WBEs is the same for the RTA agencies as it is nationally.

Table 3.6
Potential Availability as a Percent of Actual Availability

Procurement Category	African-American MBEs	Hispanic MBEs	Asian MBEs	Total WBEs
Construction	177.2%	133.6%	100.0%	100.0%
Services	228.7%	108.7%	100.0%	100.0%
Commodities	301.8%	106.6%	100.0%	100.0%

Note: The figures reported in this table were developed using a statistical technique known as "logit analysis". The source of data for this analysis is the U.S. Bureau of the Census, Current Population Surveys (1986-1990).

Potential availability is calculated by multiplying the percent of total M/WBE firms (i.e., with or without paid employees) available to each agency by the appropriate multipliers which can be derived from the percentages reported in this table. For example, the potential availability multiplier for African-American construction firms is 1.772.

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CHAPTER 4
COMPARISON OF AVAILABILITY AND UTILIZATION OF MINORITY AND WOMEN-OWNED FIRMS IN THE RTA'S GEOGRAPHIC MARKET

This chapter examines whether firms owned by minorities and women would be underutilized in the absence of the affirmative action goal programs currently used by the RTA member agencies for procuring goods and services. The best way to determine whether M/WBEs would be underutilized in the absence of these programs would be to examine RTA procurements that were not subject to such goals program. That is not feasible because the

RTA member agencies have had, since the early 1980s, goal programs that applied to almost all of their procurements. Although several agencies have suspended their programs for nonfederally funded procurements since the Croson decision, too few nonfederally funded procurements have been made to provide the basis for a statistically reliable analysis.

Without agency-specific information on procurements in the absence of M/WBE goal programs, there are two sources of evidence on the utilization of M/WBEs without such affirmative action programs. First, several public agencies in the Bay Area procure goods and services from geographic and procurement markets that are similar to those of the RTA member agencies. Evidence that these agencies have underutilized M/WBEs in the absence of goal programs is consistent with the view that marketplace discrimination makes it difficult for M/WBEs to obtain public-sector work. We have completed studies of M/WBE utilization for Alameda County, Contra Costa County and the City of Hayward.[59] These public agencies have conducted procurements without M/WBE affirmative action programs in recent years. They therefore provide useful information on what the race and gender composition of the procurement by RTA member agencies would be in the absence of the current DBE programs.

The private sector is the second source of information. Looking at the private sector is informative because discriminatory practices that limit the ability of M/WBEs to compete in the public sector also limit their ability to compete in the private sector: for example, discrimination in commercial lending affects the availability of working capital for M/WBEs

[59] We have also conducted a study for the San Francisco Redevelopment Agency. The Redevelopment Agency has maintained aggressive race/gender-conscious M/WBE programs following Croson, preventing us from studying Agency utilization in the absence of a program.

construction firms who do private or public work (see Chapter 5). Moreover, with rare exceptions, the private sector does not have affirmative action programs for M/WBEs; therefore the private sector provides a picture of M/WBE utilization in the absence of such programs.

This chapter is organized as follows. In Section A, we discuss our general methodology for determining whether M/WBEs have been underutilized in the public and private sectors. In Section B, we summarize our findings concerning disparities in private-sector contracting in the geographic areas and industries from which the RTA member agencies procure goods and services. In Section C, we summarize our findings concerning disparities in public-sector contracting in Alameda County, Contra Costa Counties and the City of Hayward. Section D summarizes our conclusions.

A. Measuring Disparities

This section describes our general methodology for determining whether M/WBEs have been underutilized. To better understand this issue, we consider several simple examples. Suppose that there are one million firms available to do business with the RTA agencies and that each one of these firms has exactly the same qualifications. Each firm is of the same size, experience, capitalization and so forth. But some of the firm owners are African American and others are white. Let us suppose that 25 percent are African American and 75 percent are white. When an agency has to select a contractor to do a job (or when the agency's prime contractors have to select subcontractors), we can, for this simple and obviously unrealistic world, think of an agency (or their prime contractors) as selecting a firm from this

large pool of equally qualified firms.[60] Suppose an agency has to choose 100 contractors from this pool. How many of these contractors will be African American-owned firms and how many will be white-owned firms? The answer is, we do not know for sure. Depending upon how it picks from this pool it might sometimes, as a result of chance, pick predominantly African American or predominately white firms. But we know, from the laws of probability, that "on average"—over the many times that an agency goes out and chooses 100 contractors—it will get 25 African American-owned firms and 75 white-owned firms. However, it would not be surprising if an agency sometimes got 20 African American firms or sometimes 30.

What if an agency chose only one African American contractor out of 100 contractors? Could this be due to chance? It could, but the likelihood of this happening is so low that we would be very surprised. It turns out that the probability of picking only one African American contractor out of 100 contractors, when 25 percent of the contractors are African American, is less than one in one million. In this case, statisticians would say that the result is so unusual that it probably is not due to chance. For any particular number of African American contractors chosen, it is possible, using elementary statistical methods, to determine whether the number is so unusual that it is not likely to be due to the normal luck of the draw.[61] If African Americans were chosen infrequently, we would suspect that the game of picking firms

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[60] This simple example corresponds to what is known in statistics as an urn model. You have an urn with one million black and white balls in a proportion of 25 percent and 75 percent. You pick 100 balls at a time from this urn. Statistical theory examines the likelihood of the proportion of black and white balls in this "sample" of 100 balls differing from the proportion of black and white balls in the "population" of 1 million balls.

[61] The particular method here is known as the binomial formula which gives the probability of any particular number of choices from a given number of draws.

is not being played fairly—the people picking the firms are intentionally shying away from the African American firms or there is something that makes it harder for these firms to get chosen.

The problem with the example we have just given is that there are likely to be substantial differences between the firms that an agency can choose, even after an agency narrows the population of firms down to those firms they deem responsive and responsible and capable of performing work. While there are statistical methods available to take differences between firms into account, reliable data on the quality of firms are not available to implement these methods. Moreover, the differences might be matters more of perception than of necessity and might therefore reflect current or past discrimination. Hence, as a cursory way to compare the utilization and availability of M/WBEs, the simple statistical framework described here is adequate, especially if we are willing to make some assumptions about the sources and importance of discrimination, as we do below.

What percent of procurements or procurement dollars would go to M/WBEs in the absence of discrimination? The answer to this question largely depends upon a number of assumptions about the importance of various sources of discrimination and differences between race and gender groups. To help focus our discussion, we will consider two alternative scenarios about the extent of discrimination.

For our first scenario, we restrict our attention to those M/WBEs and nonminority firms that have the same qualifications for undertaking work. Qualifications should include factors that have a reasonable business relationship to the awarding of contracts such as experience, capacity for completing work and price. Obviously, once we truly restrict the

comparison to "similarly situated" businesses, we would expect that the percent of work obtained by qualified M/WBEs would approximate the percent of capacity controlled by these M/WBEs. The problem with this comparison is that the qualifications of M/WBEs may be affected by exactly the kinds of discrimination that we are trying to detect. Discrimination by state and local agencies, prime contractors, bonding companies, banks, unions, trade associations and other market participants—discrimination that we show in Chapter 5 to be prevalent in the geographic and procurement markets for the RTA member agencies—makes it harder for minorities and women to start businesses and to develop qualifications that are identical to nonminority firms. This discrimination reduces the availability and competitiveness of M/WBEs below that which would exist in the absence of discrimination. A disparity analysis based on the current availability of M/WBEs that have the same qualifications as nonminority firms would obviously fail to detect these sources of discrimination.

Let us suppose, for our second scenario, that we restrict ourselves to those individuals who have started their own businesses. If we believe that, among these individuals, the ability to run a business would not, in the absence of discrimination, differ among race and gender groups, then the distribution of contract awards and dollars would follow the distribution of business ownership by race and gender group. If five percent of the businesses were owned by Asian men, we would, under this assumption, expect that five percent of contracts and five percent of contract dollars would be awarded to Asian-owned companies; large deviations from these shares could be construed as evidence of discrimination.

Of course, M/WBEs generally operate smaller businesses than non-M/WBEs, in part, because discrimination has limited the acquisition by minorities and women of the social and financial capital necessary for running larger businesses. It is impossible to ascribe all of the problems that limit the development of M/WBEs to current discrimination. Nonetheless, comparing the percent of businesses operated by M/WBEs to the percent of projects and project dollars received by minorities and women is useful. Such a comparison was the basis of a minority business program implemented by the State of Ohio which Justice O'Connor cited favorably in Croson. The Ohio program's estimate of availability was based on the minority percent of the business population, while the Richmond program used the minority percent of the general population.

For the purposes of establishing whether there is a disparity between the utilization of M/WBEs by an agency, the MBE and WBE percentages of the business population, unadjusted for detailed firm qualifications, has at least three advantages as a measure of M/WBE availability. First, as just mentioned, this measure was used by the State of Ohio in developing its program which was affirmed in Ohio Contractors Assn. v. Keip, a lower court decision that was cited, without disapproval, by Justice O'Connor. Second, as we shall discuss below, it is possible to estimate the percent of businesses owned by minorities and women from available data sources. Third, the percent of businesses owned by minorities and women is not as underinclusive as an analysis that focuses on similarly qualified businesses. That is,

this measure does not consider as unavailable M/WBEs that, possibly because of discrimination, have not attained the same qualifications as majority firms.[62]

For these reasons, we measure availability using the approach described in the last chapter. We use Census data to measure the number of M/WBEs and the number of total establishments in each county and industry. For the purposes of comparing availability to utilization, we calculate overall availability by taking a weighted average of availability in each county and industry across the counties and industries in the relevant geographic and procurement markets. If the overall utilization of M/WBEs in these geographic and procurement markets—e.g., in construction in the greater Bay area—is less than overall availability, we conclude that there has been underutilization of M/WBEs. In the next section, we describe the results of this analysis for Alameda and Contra Costa Counties.

There are two different tests that we used to determine whether disparities exist between the availability and utilization of minority and women-owned businesses. In the following two subsections, we describe the question that each test addresses.

1. Disparity Between Availability and Numerical-Utilization of M/WBEs

This test (which we will refer to as the "Numerical-Utilization Test") examines whether the number of procurements received by M/WBEs is lower than would be expected based on their availability. Utilization, for the purposes of this test, will be measured as the number of procurements received by a particular race or gender group divided by the total number of procurements. Essentially, we will assume that if seven percent of all firms are Asian-owned

[62] Nonetheless, the measure is still overinclusive to the extent, if any, that it is possible that M/WBEs might not have the same qualifications as non-M/WBEs even in the absence of remediable discrimination. It is underinclusive to the extent, if any, that it does not consider M/WBEs that would have existed but for remediable discrimination.

(i.e., seven percent Asian MBE availability), each time a procurement is awarded, there is a seven percent chance that it will go to an Asian MBE. If Asian MBEs receive fewer procurements than would be expected based on their availability (i.e., less than seven percent of procurements in our example), we would have evidence that Asian MBEs are being underutilized.

To continue with our example, however, even in the absence of discrimination, we would expect that Asian MBEs would sometimes receive more than seven percent of procurements and sometimes less than seven percent of procurements just as a matter of chance. As mentioned in the previous section, it is possible to calculate the probability of observing particular degrees of underutilization or overutilization. The probability of observing a particular degree of underutilization depends upon: (a) the degree of underutilization, (b) availability (which measures expected utilization) and (c) the number of procurements that we have examined in calculating utilization.[53]

If the probability of observing a particular disparity between utilization and availability is less than five percent (i.e., less than one out of 20 times), we would conclude that the

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[53] In technical terms, the test statistic denoted by Z is:

$$Z = \frac{\hat{p} - p_0}{\sqrt{\frac{p_0(1-p_0)}{n}}}$$

where
- $\hat{p}$ = ratio of M/WBE to total procurements
- p_0 = ratio of M/WBEs to total firms
- n = number of total procurements.

If Z is greater than approximately two, in absolute value, then the chances of observing such as large disparity is less than five percent (i.e., we would expect to observe such a large disparity only one out of 20 times).

disparity is so unlikely that it is probably not due to chance.[64] In the language of statistics, a disparity that is likely to occur less than five percent of the time is called "statistically significant." Thus, if Asian MBEs receive three percent of procurements — substantially less than the seven percent we would expect in our example — and if the likelihood of this happening as a result of chance is less than one out of 20 times, we would conclude that there is a statistically significant disparity for Asian MBEs.

While tests for statistical significance are extremely useful for assessing whether chance can explain the disparities that we observe, they do have important limitations. First, if a disparity is not statistically significant, we cannot conclude that it *is* due to chance. It just means that we cannot rule chance out on that test alone. Second, there are circumstances under which tests for statistical significance are not very helpful for distinguishing between disparities due to chance and disparities due to other reasons such as discrimination. In the particular statistical application in this chapter, tests for statistical significance are less reliable when: (a) we examine a relatively small number of procurements and (b) the expected utilization of particular race and gender groups — measured by their availability — is relatively small.[65]

It is also important to distinguish "statistical significance" from "substantive significance." A disparity is statistically significant if we can rule chance out. A disparity is

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[64] Five percent is a somewhat arbitrary, but common, benchmark used by statisticians. In employment discrimination litigation, the courts frequently have not considered disparities that could occur more than five percent of the time as a result of chance to be statistically significant.

[65] In statistical language, these are circumstances under which the "power" of the test is relatively low.

substantively significant if it is large. It is possible to have a disparity that is not substantively significant—i.e., the disparity is relatively small—but is statistically significant—i.e., the disparity is unlikely to have arisen by chance. It is also possible to have a disparity that is substantively significant—i.e., the disparity is relatively large—but is not statistically significant—i.e., the disparity, although large, could have arisen by chance.

2. Disparity Between Availability and Dollar Utilization of M/WBEs

In the Numerical-Utilization Test, a $1 procurement receives the same weight as a $1,000,000 procurement. In other words, if M/WBEs receive a share of the larger projects that is less than would be expected based on their availability, but receive a correspondingly higher share of small contracts than would be expected based on their availability, then this test would not reach a finding of a disparity. It is thus desirable to account for the size of procurements as well as the number of procurements.

The "Dollar-Utilization Test" is analogous to the Numerical-Utilization Test. It also tests whether the utilization of M/WBEs is lower than would be expected based on their availability, but utilization is measured here in dollars instead of by the number of

procurements.[56] There might be cases where M/WBEs receive a proportionate share of projects, but not of project dollars; this scenario is the focus of this test.

3. Measures of the Magnitude of Disparities

In the case of both tests, it is helpful to report a summary measure of the extent to which M/WBE utilization deviates from expected utilization. A convenient measure is the percent of expected utilization, or availability, that is achieved. Thus, if the availability of Hispanic MBEs is ten percent, we would expect that utilization would be ten percent. Suppose we find utilization is only eight percent. Then utilization is only 80 percent (eight percent divided by ten percent) of availability. A ratio of less than 100 indicates that the group under consideration has been underutilized; the lower the ratio of actual utilization to availability, the greater the extent to which M/WBEs have been underutilized.

B. Private-Sector Disparities

We estimated private-sector utilization based on three data sources: (1) our mail survey of M/WBEs which we will discuss in detail in the next chapter; (2) the 1987 Census of

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[56] In technical terms, the test statistic denoted by Z is:

$$Z = \frac{\hat{d} - d_0}{\sqrt{\dfrac{d_0(1-d_0) * \Sigma C_i^2}{(\Sigma C_i)^2}}}$$

where $\begin{cases} \hat{d} = \text{ratio of M/WBE dollars to total dollars} \\ d_0 = \text{ratio of M/WBEs to total firms} \\ C_i = \text{dollar size of procurements.} \end{cases}$

If Z is greater than approximately two, in absolute value, then the chances of observing such a large disparity is less than five percent (i.e., we would expect to observe such a large disparity only one out of 20 times).

Construction Industries, Census of Wholesale Trade and Census of Service Industries, and (3) the 1987 Census of Minority and Women-Owned Businesses. By comparing these rates to M/WBE availability data from the 1987 Census of Minority and Women-owned Businesses, we were able to determine whether disparities exist between utilization and availability for each M/WBE group in construction, purchasing and services.[57]

Much of the government data used to calculate private-sector utilization is only available for Metropolitan Statistical Areas (MSAs) that are defined by the U. S. Bureau of the Census. As a result, it was necessary to calculate private-sector utilization, availability, and disparities for those MSAs that comprise the relevant geographic markets for the RTA member agencies. For each agency, we identified those MSAs that have at least one county in the geographic market described in the previous chapter. After identifying the relevant MSAs, we calculated overall utilization and availability statistics tailored to each agency by weighting the data according to the proportion of agency dollars awarded to firms located in each MSA.

We begin by describing how we estimated private-sector utilization. First, we obtained data on the revenue of M/WBEs within the relevant geographic market areas for each agency using the 1987 Census of Minority and Women-Owned Businesses. An annual growth rate based on the increase in revenues for M/WBEs in California between 1982 and 1987 was applied to the 1987 revenue figures to estimate the appropriate M/WBE revenues for 1990. Next, we relied on survey data to obtain the private-sector share of that revenue.

[57] Data were not available concerning the share of services used by public and private sectors. For services, then, overall utilization and disparity were examined.

We then compared the total M/WBE private-sector revenues to overall private-sector revenues. The 1987 Census of Construction Industries, Census of Wholesale Trade and Census of Service Industries provided overall revenues for each major procurement category.[68] For construction and purchasing, the Census provided the share of work done for statewide estimates of private-sector clients; these shares were applied to the total revenue figures to determine overall private-sector revenues.[69] We estimated private-sector utilization for each M/WBE group in each major procurement category by dividing M/WBE private-sector revenues by overall private-sector revenues. For construction, Census also provided data on the amount of revenues received as prime and subcontractors. We, therefore, calculated private-sector utilization for prime contractors, subcontractors and overall construction firms.

We used these data sources to calculate the percent of dollars that were received by M/WBEs in each MSA. We then calculated the overall utilization for each RTA agency by taking a weighted-average utilization across all the MSAs in the agency's geographic market: the weights were equal to the percent of dollars awarded to firms in each MSA.

In order to conduct the disparity analysis properly, it was necessary to calculate comparable availability figures. To do so, we used an approach similar to the one described in the previous chapter. For each MSA and major procurement category, we calculated the

[68] These 1987 figures were converted to 1990 dollars using GNP data from the Economic Report of the President.

[69] For services, Census did not publish a breakdown between public and private-sector revenues; therefore, we based our analysis on overall utilization.

percent of firms that were owned by minorities and women.[70] For example, the availability of African American MBEs in the San Francisco MSA is calculated by taking the ratio of African American firms with paid employees in the MSA divided by the total number of establishments with paid employees in the MSA. Overall availability figures were calculated for the relevant geographic market by taking a dollar-weighted average of availability across all of the MSAs in the geographic market. We then calculated the ratio of utilization and availability to give us a dollar-based disparity test.[71]

The resulting disparity ratios are reported in Tables 4.1 through 4.7 for each agency. Within each procurement category, the disparities differ greatly for each M/WBE group across the agencies. In no case, however, did any group receive even their expected share of private-sector procurement dollars. In general, African American MBEs were frequently the most underutilized of all the M/WBE groups while WBEs usually fared the best; however, large disparities still exist for women. For the industries analyzed, the most substantial underutilization was found in commodity purchasing. For example, African American MBEs received less than 3.5 percent of their expected share of private-sector dollars as commodity vendors. Although women fared the best of the M/WBE groups in purchasing, they still never received more than 13.3 percent of their expected share of the private-sector purchasing dollars. Asians and Hispanics received less than 4.3 percent and 9.2 percent of their expected

[70] In the previous chapter, we calculated availability at a more detailed level of analysis —i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with the utilization figures which are available only at the MSA and major procurement level. The approach discussed in the previous chapter is more narrowly tailored and should be used as the basis for setting or revising DBE goals.

[71] Data were not available to conduct a project-based test.

Table 4.1
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
AC TRANSIT

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.2 %	4.0 %	5.0 %
	Asian	0.4	5.5	7.2
	Hispanic	0.8	6.6	12.1
	Women	1.6	8.7	18.3
Construction – Prime Contractors				
	African American	0.1 %	4.0 %	2.5 %
	Asian	0.3	5.5	5.4
	Hispanic	0.5	6.6	7.6
	Women	1.0	8.7	11.5
Construction – Subcontractors				
	African American	0.6 %	4.0 %	15.0 %
	Asian	0.5	5.5	9.1
	Hispanic	1.5	6.6	22.7
	Women	3.0	8.7	34.4
Services				
	African American	0.7 %	2.6 %	26.8 %
	Asian	3.0	11.2	26.9
	Hispanic	1.0	3.3	30.4
	Women	6.1	18.6	32.8
Commodity Purchasing				
	African American	0.0 %	0.8 %	2.5 %
	Asian	0.8	23.6	3.4
	Hispanic	0.2	2.2	9.2
	Women	2.4	19.0	12.7

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.2
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
BART

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.2 %	3.6 %	5.5 %
	Asian	0.7	7.3	9.7
	Hispanic	0.9	6.4	14.2
	Women	2.4	8.8	27.2
Construction – Prime Contractors				
	African American	0.1 %	3.6 %	2.8 %
	Asian	0.5	7.3	6.9
	Hispanic	0.5	6.4	7.9
	Women	1.5	8.8	17.0
Construction – Subcontractors				
	African American	0.6 %	3.6 %	16.7 %
	Asian	1.0	7.3	13.8
	Hispanic	1.7	6.4	26.8
	Women	4.6	8.8	52.2
Services				
	African American	1.0 %	3.3 %	30.5 %
	Asian	3.0	10.6	28.3
	Hispanic	1.0	3.4	29.3
	Women	6.4	19.2	33.3
Commodity Purchasing				
	African American	0.0 %	1.0 %	2.0 %
	Asian	0.8	23.4	3.4
	Hispanic	0.1	2.1	4.9
	Women	2.1	18.9	11.1

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.3
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
GGBH&TD

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.3 %	3.2 %	9.2 %
	Asian	1.4	15.3	8.9
	Hispanic	1.1	6.0	18.4
	Women	3.8	9.1	41.8
Construction – Prime Contractors				
	African American	0.1 %	3.3 %	3.1 %
	Asian	1.1	15.8	7.0
	Hispanic	0.6	6.0	10.0
	Women	2.3	9.1	25.3
Construction – Subcontractors				
	African American	0.9 %	3.3 %	27.5 %
	Asian	2.0	15.8	12.6
	Hispanic	2.1	6.0	35.1
	Women	7.2	9.1	79.1
Services				
	African American	0.5 %	1.8 %	27.2 %
	Asian	3.2	11.9	26.8
	Hispanic	0.8	2.9	27.9
	Women	6.0	17.8	33.8
Commodity Purchasing				
	African American	0.0 %	0.9 %	2.2 %
	Asian	0.7	21.9	3.2
	Hispanic	0.1	2.0	4.9
	Women	2.0	18.9	10.6

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.4
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
MUNI

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.3 %	3.0 %	10.0 %
	Asian	1.5	17.5	8.5
	Hispanic	1.1	6.6	16.7
	Women	4.0	9.1	43.9
Construction – Prime Contractors				
	African American	0.1 %	3.0 %	3.3 %
	Asian	1.2	17.5	6.8
	Hispanic	0.7	6.6	10.7
	Women	2.5	9.1	27.5
Construction – Subcontractors				
	African American	0.9 %	3.0 %	29.9 %
	Asian	2.2	17.6	12.5
	Hispanic	2.2	6.6	33.5
	Women	7.7	9.1	84.6
Services				
	African American	0.6 %	1.9 %	31.6 %
	Asian	3.1	11.9	26.0
	Hispanic	0.9	3.6	25.2
	Women	6.0	17.1	35.0
Commodity Purchasing				
	African American	0.0 %	0.9 %	3.4 %
	Asian	1.0	23.4	4.3
	Hispanic	0.1	2.2	4.5
	Women	2.5	18.9	13.3

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.5
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
SAMTRANS

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.2 %	3.0 %	6.6 %
	Asian	1.0	11.4	8.8
	Hispanic	1.1	7.2	15.2
	Women	2.9	8.6	33.9
Construction – Prime Contractors				
	African American	0.1 %	3.0 %	3.3 %
	Asian	0.8	11.4	7.0
	Hispanic	0.7	7.2	9.7
	Women	1.8	8.6	21.0
Construction – Subcontractors				
	African American	0.7 %	3.0 %	23.2 %
	Asian	1.5	11.4	13.2
	Hispanic	2.2	7.2	30.5
	Women	5.5	8.6	64.2
Services				
	African American	0.5 %	1.8 %	28.2 %
	Asian	3.2	12.0	26.6
	Hispanic	0.8	2.9	27.6
	Women	5.8	17.6	32.9
Commodity Purchasing				
	African American	0.0 %	0.9 %	2.3 %
	Asian	0.8	23.3	3.4
	Hispanic	0.1	2.1	4.7
	Women	2.2	18.7	11.7

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.6
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
SCCTA

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction -- Overall				
	African American	0.1 %	1.3 %	7.6 %
	Asian	0.7	8.0	8.7
	Hispanic	1.1	13.0	8.4
	Women	1.3	8.1	16.1
Construction -- Prime Contractors				
	African American	0.0 %	1.3 %	1.5 %
	Asian	0.6	8.0	7.5
	Hispanic	0.7	13.0	5.4
	Women	0.8	8.1	9.9
Construction -- Subcontractors				
	African American	0.2 %	1.3 %	15.2 %
	Asian	1.1	8.0	13.7
	Hispanic	2.1	13.0	16.1
	Women	2.5	8.1	30.9
Services				
	African American	0.5 %	1.7 %	29.7 %
	Asian	3.0	12.0	25.0
	Hispanic	0.9	4.0	22.3
	Women	5.6	17.8	31.5
Commodity Purchasing				
	African American	0.0 %	1.0 %	2.1 %
	Asian	0.6	20.5	2.9
	Hispanic	0.1	3.7	2.7
	Women	0.8	15.3	5.2

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis--i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

Table 4.7
REGIONAL TRANSIT ASSOCIATION
PRIVATE SECTOR DISPARITY ANALYSIS
CCCTA

Procurement Category	M/WBE Group	Utilization (1)	Availability (2)	Disparity Ratio (3) [(1)/(2)]
Construction – Overall				
	African American	0.2 %	4.2 %	4.7 %
	Asian	0.4	6.2	6.5
	Hispanic	0.7	5.7	12.3
	Women	1.9	8.9	21.5
Construction – Prime Contractors				
	African American	0.1 %	4.2 %	2.4 %
	Asian	0.3	6.2	4.9
	Hispanic	0.4	5.7	7.0
	Women	1.1	8.9	12.4
Construction – Subcontractors				
	African American	0.7 %	4.2 %	16.5 %
	Asian	0.6	6.2	9.8
	Hispanic	1.4	5.7	24.5
	Women	3.5	8.9	39.5
Services				
	African American	1.0 %	3.3 %	30.3 %
	Asian	3.0	10.7	28.0
	Hispanic	1.0	3.4	29.4
	Women	6.3	19.1	32.9
Commodity Purchasing				
	African American	0.0 %	1.3 %	1.5 %
	Asian	0.6	21.5	2.8
	Hispanic	0.1	2.1	4.7
	Women	1.5	18.3	8.2

Notes and Sources:

Data from U. S. Census Bureau, 1987 Census of Minority/Woman-Owned Businesses, Census of Construction Industries, Census of Services Industries, and Census of Wholesale Trade, and NERA's survey of minority and woman-owned firms in the Bay Area.

No data were available from Census on the percent of services performed for the private sector; therefore, the services calculations are for overall utilization and disparity.

Utilization and availability calculations for each agency are weighted geographically based on the agency's geographic market.

In Chapter 3, we calculated availability at a more detailed level of analysis—i.e., by county and 2-digit SIC code. We could not use the same availability figures for the private-sector disparity analysis because the availability figures need to be consistent with utilization figures which are available only at the MSA and major procurement level.

1990 for Alameda County and from July 1985 for June 1987 for Contra Costa County: Contra Costa had a goals program for services after June 1987.

Alameda and Contra Costa County procure the preponderance of their goods and services from the greater Bay Area—the same geographic market as do most of the RTA member agencies. There is also a considerable overlap in the goods and services that the counties and the RTA member agencies procure, although there are differences that result from the transportation-related procurement by the RTA member agencies.

For both counties, we examined contracts and purchases that were awarded during the periods mentioned above. For each contract and purchase order, we determined whether the awardee was an M/WBE by consulting a compilation of M/WBE directories and other sources. For large construction contracts, we surveyed the prime contractor to identify all subcontractors on the project. We then used the M/WBE directories to determine whether these subcontractors were M/WBEs. After completing this identification process, we calculated the percent of projects and dollars that were awarded to M/WBEs.

We now turn to the results of the disparity tests for Alameda and Contra Costa Counties. The results of this analysis are reported in Table 4.8. Generally, the results point to the substantial underutilization of M/WBEs in construction, services and purchasing. Out of the 80 disparity ratios in the table, 61 (76 percent) indicate that a race or gender group was underutilized—i.e., the disparity ratio was less than 100—and 55 (69 percent) indicate that the race or gender group was used less than 80 percent as much as we would expect—i.e., the disparity ratio was less than 80. We view this as strong evidence of systematic underutilization of M/WBEs.

Table 4.8
Summary of Disparity Ratios for Alameda County,
Contra Costa County, and Hayward

Procurements That Were Not Subject to M/WBE Requirements

Construction (Prime Contracting)

	Alameda		Contra Costa (contracts over $25,000)		Contra Costa (contracts of $25,000 or less)		Hayward (contracts under $100,000)	
MBE Category	Dollars	Projects	Dollars	Projects	Dollars	Projects	Dollars	Projects
African American MBEs	199%	223%	0%	0%	11%*	14%*	92%	31%*
Asian MBEs	0%	0%	39%	143%	42%*	23%*	0%	0%*
Hispanic MBEs	101%	223%	78%	59%	51%*	36%*	138%	24%*
Total WBEs	0%	0%	0%	0%	18%*	29%*	113%	42%*

Construction (Subcontracting)

	Alameda		Contra Costa		Hayward	
MBE Category	Dollars	Projects	Dollars	Projects	Dollars	Projects
African American MBEs	0%	0%	69%	128%	N/A	N/A
Asian MBEs	348%	90%	301%	278%	N/A	N/A
Hispanic MBEs	46%	93%	13%	47%	N/A	N/A
Total WBEs	34%	82%	75%	153%	N/A	N/A

Note: An asterisk (*) indicates that the disparity is statistically significant at the five percent level or better.
N/A: Not available.

Table 4.8
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Table 4.8
Summary of Disparity Ratios for Alameda County,
Contra Costa County, and Hayward

Procurements That Were Not Subject to M/WBE Requirements

Services

	Alameda (contracts over $25,000.00)		Alameda (contracts of $25,000 or less)		Contra Costa		Hayward	
MBE Category	Dollars	Projects	Dollars	Projects	Dollars	Projects	Dollars	Projects
African American MBEs	276%	109%	126%	103%	43%*	22%*	57%	13%*
Asian MBEs	74%	67%	11%	14%*	11%*	11%*	21%*	6%*
Hispanic MBEs	52%	88%	30%	13%*	20%*	15%*	1%	2%
Total WBEs	80%	172%	31%	25%*	21%*	28%*	5%*	3%*

Commodities

	Alameda		Contra Costa		Hayward	
MBE Category	Dollars	Projects	Dollars	Projects	Dollars	Projects
African American MBEs	194%	183%	144%	643%	13%	30%*
Asian MBEs	4%	6%*	3%*	41%*	1%*	1%*
Hispanic MBEs	24%	6%*	8%	36%*	0%	11%*
Total WBEs	22%	26%*	25%*	115%	17%*	17%*

Note: An asterisk (*) indicates that the disparity is statistically significant at the five percent level or better.

There are two major exceptions to this finding. First, the evidence indicates that Asian subcontractors were used about as much as we would expect given their availability—they received more than their expected share of the dollars in both counties and more than their expected share of the projects in Contra Costa County. As prime contractors, however, Asian MBEs were substantially underutilized.

Second, the evidence indicates that African American MBEs were not underutilized in commodity procurements in either county. In interpreting this finding, however, it is important to keep in mind that the availability of African American MBEs in commodities is extremely low. Only about one percent of commodity firms were African American in the Alameda and Contra Costa geographic markets—much lower than one would expect based on the population of African Americans in the area and much lower than the availability of African American MBEs in construction and professional services. The large underrepresentation of African Americans in commodities in the San Francisco area is also true nationally. The potential availability analysis reported in the previous chapter found the greatest disparity between actual and potential availability for African Americans in commodities. Thus, African Americans appear to be doing so well in commodities in both counties in large part because they are so grossly underrepresented in the business population that it takes very few projects with African American firms to reach their expected share of projects or dollars.

Our recently completed disparity analysis for the City of Hayward also provides relevant public-sector disparity results. Hayward's geographic market is quite similar to the RTA members'. The City relies heavily on firms located in Alameda, Contra Costa and San

Francisco Counties. There is also considerable overlap in the types of goods and services purchased. Hayward provides useful utilization data during periods in which no race, gender-conscious or affirmative action programs were in place. Such data are available for small construction projects (under $100,000) and professional services over the period July 1, 1986 through April 12, 1992, and for purchasing over the period January 1, 1990 through April 2, 1992.

As shown by Table 4.8, we found that all M/WBE groups in construction were underutilized as prime contractors. We did not, however, have sufficient data to test for disparity among construction subcontractors. In contrast to the Alameda and Contra Costa studies, we also found all M/WBE groups were underutilized in services and commodities including African American commodities firms.

D. Conclusions

This chapter has examined whether M/WBEs have been underutilized in the geographic areas and industries relevant to RTA procurements. To address this issue, we examined procurements by three governments in the RTA service area—Alameda County, Contra Costa County and the City of Hayward—that have undertaken procurements that were not subject to affirmative action goal requirements during at least some period of time since 1985. We found that, without affirmative action efforts, both counties used fewer M/WBEs than we would expect based on their availability with the exception of African Americans in commodities[72] and in Asians in construction subcontracting. Alameda and Contra Costa

[72] As noted earlier, however, African Americans are not underutilized in commodities largely because there are very few African American commodity firms, a fact that may result from discrimination.

Counties and the City of Hayward procure goods and services from virtually the same geographic area as do the RTA agencies. Given these findings, we would expect that the RTA agencies would also underutilize M/WBEs if they did not have any affirmative action goals programs.

Our private-sector results further support this conclusion. We examined the utilization of M/WBEs in the private sector in the geographic areas from which the RTA agencies procure goods and services. For each agency, we found that M/WBEs were used less in the private sector than we would expect given their availability. We found significant underutilization of African American, Asian, and Hispanic MBEs and WBEs in construction prime and subcontracting, services, and commodities. In almost all cases, M/WBEs were used at a rate less than 30 percent of what we would expect.

In the next chapter, we examine direct evidence of discrimination gathered from personal interviews, testimony at public hearings, legal cases, and other studies to determine the possible sources of the statistical disparities documented in this chapter.

CHAPTER 5
ANECDOTAL EVIDENCE OF DISCRIMINATION IN THE RTA'S GEOGRAPHIC MARKET

The U.S. Supreme Court has found in several recent decisions that statistical evidence may not, by itself, be sufficient to establish that minorities or women have faced discrimination.[73] It is also necessary to identify the sources of discrimination that may have led to these statistical disparities. It is generally necessary to examine anecdotal evidence of discrimination to assess the likelihood that particular statistical disparities have arisen from

[73] Watson v. Forth Worth Bank & Trust, 108 S.Ct. 2777 (1989) and Wards Cove Packing Company v. Atonio, 490 U.S. 642 (1989).

particular discriminatory practices rather than from cultural differences or the long-lived effects of past discrimination.[74]

There are many possible ways in which M/WBEs may experience discrimination:

- Government contracting practices which create explicit or implicit barriers for M/WBEs;
- Disparate treatment of M/WBEs by government contract officers;
- Disparate treatment of M/WBEs by financial institutions;
- Disparate treatment of M/WBEs by prime contractors; and
- Prevailing social conditions regarding race, ethnicity and gender such as employment discrimination or redlining.

Anecdotal evidence concerning the extent, if any, to which particular racial, ethnic or gender groups experience contemporary marketplace discrimination is helpful for at least two reasons. First, it helps to verify the statistical findings presented in the previous chapter. Second, it helps to identify the sources and victims of discrimination.

We have collected anecdotal evidence by:

[74] Anecdotal evidence for our purposes refers primarily to nonquantitative information based on a variety of sources including public testimony, personal interviews, surveys, lawsuits, news accounts and other studies. Quantitative evidence, however, is also relevant, e.g., the number of employment discrimination cases against construction firms.

- conducting public hearings at four Bay Area locations—San Carlos, Concord, San Francisco, and San Jose;[75]
- surveying 5,000 M/WBE businesses in the Bay Area;
- reviewing case filings and court decisions involving discrimination claims;
- reviewing the academic literature on discrimination;
- reviewing reports prepared by and for government agencies on discrimination; and
- reviewing newspapers for accounts of discrimination in the Bay Area.

Table 5.1 summarizes the evidence collected by form and source. As shown in the table, we found evidence of virtually all forms of discrimination from several sources. Based on our review, we have concluded that there is a large body of evidence that the observed disparities between M/WBE utilization and availability is, the result of racial, ethnic and gender discrimination. We have found that most of the practices and conditions outlined in Table 5.1 have occurred, or at least have been perceived to have occurred, within the greater Bay Area, which constitutes the bulk of the geographic market for procurement by each of the RTA member agencies, as we saw in Chapter 3. The evidence to support this conclusion is described and evaluated below.

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[75] In addition to these hearings which were conducted during May 1992, we conducted a public hearing in Hayward in April 1992 for a disparity study we completed for the City of Hayward. Five other hearings have been held over the past two years. Four public hearings were conducted for Alameda and Contra Costa Counties in May 1991. A public hearing was held for the San Francisco Redevelopment Agency in June 1991. Although the Ninth Circuit of Appeals in Coral v. King County limited the relevant evidence to minority firms which have done business in a specific political jurisdiction, the testimony presented at these hearings is relevant because RTA's geographic market clearly covers much of the same area. Minority firms conduct business within this broader area.

Table 5.1

Table 5.1
SUMMARY OF FORMS OF ANECDOTAL EVIDENCE OF DISCRIMINATION IN THE BAY AREA

Discrimination By:	Hearings/Interviews	M/WBE Surveys	Court Cases	Academic and Other Studies
Prime Contractors	X	X		X
Bonding or Surety Companies	X	X		X
Banks and Other Financial Institutions	X	X		X
Suppliers	X	X		X
Trade Associations/ Unions	X	X	X	X
Government Procurement Practices:				
Bonding Requirements	X	X		X
Insurance Requirements	X	X		X
Bid Notification	X	X		X
Slow Pay	X	X		X
Certification	X			

NOTE: "X" indicates that evidence of discrimination was found from the source identified.

The first section of this chapter discusses the forms of discrimination we have considered and the potential sources we have examined. The second section presents an overview of discrimination in the Bay Area. The third and fourth sections describe the evidence we collected through public hearings and personal interviews. The fifth section describes the results of a survey of M/WBE firms in the Bay Area regarding discrimination. The sixth section presents our review of court decisions. The seventh section summarizes the findings of other government, trade group and academic studies. In the final section, we present our conclusions.

A. Forms and Sources of Discrimination

We are interested in two forms of discrimination—disparate treatment and disparate impact. Disparate treatment involves intentional race or gender discrimination.[76] An example of such treatment would be a man being hired instead of a more qualified woman. Disparate impact refers to practices which are "fair in form, but discriminatory in practice."[77] Disparate treatment and disparate impact can take place at any point in the process of establishing and expanding a business.

The most blatant form of disparate treatment is outright discrimination against minorities and women. There will be some white men who simply do not like minorities and

[76] See McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973).

[77] Griggs v. Duke Power Company 401 U.S. 424 (1971).

women, and will favor other white men over them."[78] However, disparate treatment can also operate in a much more subtle manner. White men might not think of themselves as practicing discrimination even though they have stereotypes in mind for minorities and women. They might perceive minorities and women to be less qualified and competent and make discriminatory business decisions based upon these beliefs. They might not even think about minorities and women at all; when they think about their need for a subcontractor, they think solely of the same white male subcontractors they have always used.

Disparate impact occurs when members of a group are less likely to possess certain criteria that are necessary to get ahead but which are, in fact, not necessary for operating an efficient business. We consider some of these possible areas. Minorities and women may have less "social" capital — the business networks that play a significant role in determining the success of an individual or a company. It is often asserted that business contacts among family and friends are important.[79] Since the family members of minorities are generally minorities, they would have fewer potential contacts if whites are generally better situated in the industry than minorities. Women would suffer a disadvantage if gender stereotypes made

[78] Steven Askin, "Blood, Sweat and Steel," Black Enterprise, May, 1984 and Sylvia A. Law, "Girls Can't Be Plumbers' — Affirmative Action for Women in Construction: Beyond Goals and Quotas," Harvard Civil Rights-Civil Liberties Law Review, Winter 1989, detail some of the difficulties encountered by minorities and women, respectively.

[79] See Frank Fratoe, "A Sociological Analysis of Minority Business," Review of Black Political Economy, Fall 1986, pp. 19-20.

potential family connections less useful for them than for men.[30] Also, if friendships or acquaintances prove important in networking, and if white men choose, for various reasons (for example, discrimination), to associate more with other white men, then minorities and women would be disadvantaged. Finally, if minorities and women possess less financial capital than white men, then they will naturally encounter more problems in attempting to start a business. Also, because their companies are disproportionately small or new, which may be the result of past or present discrimination, they will be particularly subject to problems common to all small companies. Some of the problems might reflect actual limitations on the capabilities of small or new firms, but others are inaccurate or overly broad perceptions that might disproportionately injure M/WBEs.

For the purposes of this study, we have focused on the following possible sources of discrimination:

- Prime or general contractors
- Bonding or surety companies
- Banks and other financial institutions
- Labor unions
- Insurance companies
- Suppliers of materials
- Trade and professional associations
- Procurement policies and practices at RTA member agencies
- Other California state and local agencies

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[30] The problem of stereotyping suggests that the existence of positive role models might be helpful to potential minority and female business owners. The existence of role models can serve to suggest that entrepreneurship is both feasible and desirable. For African Americans, a shift away from the perception that African American-owned businesses are typified by "mom and pop" grocery stores and shoe-shine stands can encourage more better-educated African Americans into these areas. See Minority Business Development Agency, Research Division, "Minority Business Enterprise Today: Problems and Their Causes," pp. 12-13, for a discussion of these issues and a survey of the literature.

Several of these possible sources of impact—prime and general contracts, bonding and surety companies, and labor unions—are relevant primarily for construction firms. We have also examined several aspects of procurement that could have a disparate impact on M/WBEs:

- Bonding requirements
- Insurance requirements
- Project size
- Cost of completing proposals
- Obtaining working capital
- Insufficient notification of bid deadlines

In order to investigate these sources, we have conducted mail surveys and interviews with RTA personnel and industry participants, and reviewed the social science and legal literature on discrimination. We also conducted interviews in person or over the telephone with members of the M/WBE community.

B. Overview of Discrimination

Discrimination is an attitude that pervades many of the personal and business decisions made by people. Without laws and sanctions against discrimination, we would expect that individuals who discriminate in certain decisions will discriminate in other decisions as well. Companies that discriminate against minority employees are likely to discriminate against minority suppliers and minority customers. Men who sexually harass women are unlikely to confine themselves just to employees; we would expect them to harass other women who find themselves in a subordinate relationship.

Changing social norms together with legal sanctions against discrimination have almost certainly reduced instances of overt discrimination. Where 30 years ago a white man could

openly say, "I won't hire Negroes," with impunity, today he risks the cost of a lawsuit and perhaps some social disapproval.

The incentives to be covert about discrimination together with the fact that discriminatory attitudes tend to invade many aspects of life suggests that instances of identified, overt discrimination represent only a small fraction of the instances of discrimination that take place. Consequently, in assessing whether there is discrimination against M/WBEs in the service areas of the RTA member agencies, it is important to look beyond discrimination against M/WBEs alone. Evidence of discrimination in employment, housing and education, as well as the existence of racial tensions, are all very relevant.

Although the state of California and the Bay Area have a diverse ethnic population composition and enjoy the reputation as a progressive region, they are not free of racial prejudice. State and local agencies have, for example, continually found it necessary to monitor such prejudice and take corrective action.[31] The state of California enacted a State Civil Rights Law[32] which afforded protection against discrimination prior to the passage of the U.S. Civil Rights Act of 1964.[33]

Other state agencies, including the California Department of Fair Employment and Housing and the Fair Employment and Housing Commission, were also established to

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[31] California and the Bay Area continue to be attractive places for many minority groups. Population forecasters now predict that minority groups will constitute a majority in the State by about the year 2000. This has already occurred in the Bay Area.

[32] Government Code Sections 12900, et seq.

[33] 42 U.S.C. Sections 2000.

eliminate discrimination. The influence of these agencies has eroded, however, in recent years as the courts have limited their powers.[34]

These court actions do not necessarily reflect a lack of government concern. In fact, continued concern has also led numerous agencies to sponsor studies on discrimination over the decade (prior to the Croson decision). For example, the San Francisco Human Rights Commission (SFHRC) sponsored a study of the impacts of the City and County of San Francisco's procurement requirements on M/WBEs in 1985.[35] (The results of this study are discussed in section F of this chapter.) In 1988, the Oakland Office of Community Development and the Office of Economic Development and Employment sponsored a study to assess community credit needs, focussing on small and minority businesses.[36]

There is other evidence of continued concern regarding race discrimination in areas apart from M/WBE treatment. Racial tensions and redlining continue to plague the region. During 1990 and 1991, a string of hate crimes against racial and religious minorities, for example, prompted the California Fair Employment and Housing Commission to hold public

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[34] Recently, the State Supreme Court stripped the Fair Employment and Housing Commission (FEHC) of its authority to grant either compensatory or punitive damages. In instances of harassment where no lost wages have occurred, the Commission essentially has no authority to grant relief (cease and desist, only). In Dyna-Med v. Fair Employment and Housing Commission (1987) 43 Cal. Rptr. 67, the California State Supreme Court held that the Fair Employment & Housing Act (FEHA) (Government Code Sections 12900 et seq.) did not authorize the FEHC to award punitive damages. In Peralta Community College District v. Fair Employment and Housing Commission (1990) 276 Cal. Rptr. 114, the Court held that the FEHA did not authorize the FEHC to award compensatory damages to employment discrimination victims.

[35] Aileen Hernandez, "Between a Rock . . . and a Hard Place," September 30, 1985. Ms. Hernandez studied the impacts of bonding, insurance and other fee-related requirements of departments and agencies of the City and County of San Francisco on MBEs, WBEs and small businesses.

[36] David Rosen, "Community Credit Needs Assessment City of Oakland," prepared for the Office of Community Development and the Office of Economic Development and Employment, February 1, 1989.

hearings on race relations in the Bay Area. Racial tension has also recently been an issue in Alameda, a city in Alameda County.[37] In addition, the 1991 San Francisco mayoral election was blemished by allegations of racial bias by both leading candidates.

Racial issues have been raised regarding economic development issues as well. For example, African American community leaders have criticized The San Francisco Redevelopment Agency for failing to fund projects designed to encourage African American businesses.[38]

The role of bank and real estate redlining in thwarting economic development continues to be a source of concern in Oakland as well. A recent Oakland Tribune article by Craig Staats listed racism as an important reason for Oakland's slow economic development relative to other Bay Area communities. In this article he observed, "Racism rears its head, too, in some economic decisions: for example whether a loan is approved, whether a business locates in the city, whether someone decides to shop here. Among outsiders, Oakland — 43 percent African American — is often perceived as "a black city" and that makes some whites uneasy."[39] Staats quotes an Oakland architect to support this contention, "There's still a fair amount of racial prejudice. When people come downtown, they see a fair amount of African American faces and it scares them." Staats also quotes Oakland's City Manager, Henry Gardner as observing that "Some people are more comfortable in places that are

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[37] For example, see "Blast at Home of Alameda Police Critic," San Francisco Chronicle, November 22, 1991, page A20.

[38] Dan Levy, "Blacks Assail S.F. Redevelopment Agency," San Francisco Chronicle, May 16, 1991, page A-19.

[39] Craig Staats, "Uneasy Street," Oakland Tribune, August 4, 1991, pp. A1 and A14.

predominantly white." The Oakland Community Development office study also found that redlining by financial and real estate institutions were obstacles to economic development.

Additional evidence regarding discrimination by local financial institutions was developed by the San Francisco Chronicle.[90] According to African American loan data from the ten largest leading institutions supplied to the Chronicle, loan application denial rates were 5 percent higher for Hispanics and 56 percent higher for African Americans than for whites. While these comparisons do not fully account for other factors such as income and credit ratings, they suggest disparate treatment.[91]

Other studies relying on Federal Reserve data have produced similar findings. For example, the Wall Street Journal presented an analysis of Federal Reserve Data indicating that African Americans were 50 percent more likely to be rejected for a mortgage loan in California.[92] A study conducted for the Federal Reserve Bank of Boston showed that controlling for income, statistically significant disparities remained in mortgage lending.[93] Although these studies focus on mortgage lending, it seems likely that similar patterns would be found in commercial lending. In fact, as discussed below, financing is frequently identified as an obstacle and source of discrimination by M/WBE firms.

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[90] Kenneth Howe, "Startling Racial Trends in Home Loan Study," San Francisco Chronicle, December 2, 1991, page B-1.

[91] No statistical tests were presented to address whether the observed denial rate differences were statistically different.

[92] Paulette Thomas, "Blacks Can Face a Host of Trying Conditions in Getting Mortgages," Wall Street Journal, Monday, November 30, 1992, p. 1.

[93] Alice H. Munnell, et al., "Mortgage Lending in Boston: Interpreting HMDA Data," Federal Reserve Bank of Boston, Working Paper 92-7, October 1992.

C. Evidence from Public Hearings and Personal Interviews

In our effort to collect direct evidence of discrimination, we conducted four public hearings at various locations throughout the Bay Area— San Carlos, Concord, San Francisco and San Jose. We also performed written and telephone interviews. The persons interviewed and the witnesses at the various hearings conducted by NERA identified a number of forms and sources of discrimination which are summarized below.

1. The Hearings for the Regional Transit Association

Thirty-nine people testified at the four public hearings held by the Regional Transit Association. Seventeen of these witnesses (44 percent) were African American; six (15 percent) were Asian American and five (13 percent) were Hispanic American. A total of thirteen women (33 percent), including two minority women, testified at the hearings. The witnesses at the hearings testified of various problems they have suffered as women or minority-owned businesses, including obtaining bonding and financing, trying to break into established business networks, unions, and the "sham" nature of so-called "good faith" efforts to hire minority and women subcontractors. Their testimony is summarized below.

a. Overview of Discrimination

A number of witnesses testified to instances of blatant discrimination. Others testified more generally to subtler forms of discrimination.[94]

> An African American electrical contractor testified that he was the only minority contractor working on a job for the Valley Medical Center in San Jose was only there as part of a minority goal. Two days after he started on the job, someone had marked the portable bathrooms with "Nigger get out of here. We don't need you here." (SJ 38- 39) He also related an incident involving a

[94] Parentheses indicate hearing location and transcript page. SJ denotes San Jose; CC, Contra Costa (Concord); SAM, San Mateo (San Carlos); and GGB, Golden Gate Bridge (San Francisco).

dispute with a drywaller. The drywaller was concerned that the electrical contractor was not moving fast enough on the job and so he said to the supervisor "that's what you get for hiring niggers." (SJ 41) The electrical contractor also testified that on one occasion his secretary, a white female, had been told that his company was the low bidder on a project; however, when he showed up in person, he was informed that they could not use his company's services. (SJ 45)

The Mexican American owner of an asbestos abatement business testified that prior to forming his own business, he had worked for his father, whose partner was a white male. He had heard his father's partner make racial remarks about Mexican and black people and he testified that racial remarks had been common during his years in the construction industry and that discrimination was a significant problem. (SJ 65)

A woman who ran a trucking business testified that she has experienced sexual harassment on the job ranging from cat calls and whistling to a foreman who said "if I didn't give him a kiss at the end of a day, he wasn't going to have me back the next day." (CC 61) She related that frequently individuals did not think she could do the job because she was a woman. (CC 63-64)

A woman owner of an architectural firm testified that despite 15 years as an architect for someone else and 15 years of experience with her own architectural firm, government agencies typically stated she did not have enough experience. She said: "It has been very clear that they think we do pretty stuff but not necessarily that we have any knowledge in the technical background." (SJ 113) She related that on one job she did for Stanford University, the inspector stated "we don't really like women on this job." (SJ 114)

An Asian American woman who was an electrical contractor testified to having experienced sexual harassment on the job. Of one job, she testified: "When I walk by, extremely gross, vulgar sexual remarks were made about me. It made it such that I would refuse to go work on the job site where I didn't have my foreman or one of my workers nearby because I was afraid to be anywhere by myself." (SJ 123) She also testified that one of her frustrations was that people often assumed that she was merely a "front" for a husband or a white male. (SJ 124)

A woman who owned a metal fabrication and machining business testified that she was not taken seriously as a woman in her field. She described one instance where the representative of a public utility had "talked down to me like I wouldn't know a gasket from a rubber band." (GGB 5) She described how frequently, when one of her male employees was with her, they would try to speak with her male employee rather than to her. (GGB 9)

A woman owner of an underground electrical business testified that it was her experience that women and minorities are treated differently on the job: "You can do your best work. You can work twice as hard as everybody else. You have had to go through this intense struggle to prove to this particular jerk that you can do the job, and finally some day get through this and 'oh, well, okay. She's alright.' or 'he's alright.' And you think you accomplished something, but the next week there could be somebody else on the crew and you have to go all over again." (SJ 89) She also testified to having worked for an African American contractor at the San Francisco airport when certain majority electricians would come out to the job site and "would not work or they would do things that were counterproductive." (SJ 90)

An Asian-Indian owner of an engineering consulting firm testified that promising contract prospects would often evaporate when he visited the contractor and the contractor saw that he was a minority individual. (SAM 118)

The Asian-Indian president of an information management business testified that in one situation where his company had been the lowest responsive bidder, his company was made to submit additional information not stated in the RFP and not required of the majority contractor who currently had the concession. (SAM 145-47) In fact, he testified that his company had been very successful in obtaining contracts where they were not identified as a minority firm, but when identified as minority, their success rate had fallen to zero. (SAM 150) He stated that it had been his experience that minorities had only been given those jobs that majority-owned firms did not want. (SAM 153)

A woman owner of a moving and storage company testified about the difference in operating the company with her husband before his death and then alone after his death. She related that one major van line which had previously been dealing directly with her husband refused to deal with her once she took over and eventually pulled the contract. (CC 9) She testified that she felt she was as capable as her husband and that she employed the same personnel as her husband. (CC 9)

b. Unions

Twelve witnesses (31 percent) testified about problems with and within unions in the Bay Area. They testified concerning the lack of minority and women participation in union leadership. They spoke about the failure to give work to minority members despite their priority on union hall availability lists. Witnesses also related how they had been present when

union members had sabotaged jobs of minority-owned businesses. The following are some examples:

> An African American male who is the sole proprietor of a painting, waterproofing and sandblasting business testified about an incident where union members had sabotaged his equipment: "They dumped the oil in the sandblaster, put rocks, concrete, stone, took parts of the machine and threw them around the garage." (SAM 11) The owner testified that it was his belief that majority union members had sabotaged his equipment in part because of his nonunion status and in part because he was a minority contractor. The owner testified that no similar sabotage was perpetrated on any of the majority contractors' equipment.
>
> An African American electrician testified that in his 15 years in the union he had never seen a minority obtain a supervisory position on a job when there was a choice. (GGB 75, 83) He stated that there were no African Americans in any leadership positions with the Local because of the attitudes of the union membership. (GGB 86) In his apprenticeship class of twenty individuals, there were three African Americans and he was the only one currently left in the trade. In his 15 years of experience, he and his minority counterparts typically were given the more menial work on projects, (GGB 80), but many of his white counterparts were able to participate in significant projects immediately after coming out of the apprenticeship program. (GGB 85) He also related that he had frequently heard about and a couple of times seen majority union employees sabotage the projects of minority-owned businesses. (GGB 78) He said that there was a problem with white union laborers not working as hard for minority-owned businesses. He had seen instances where they did not work at their usual rate and had "even seen them come to work drunk, come late, leave early and just, you know, the respect is not the same." (GGB 80) He also testified that contractors often watch the union lists and put in calls so as to avoid hiring minority electricians. They wait to call the union hall until they know that majority technicians were higher up on the list. (GGB 87)
>
> Another African American electrical contractor testified that he does not use union labor even though he had been in a union for 17 years prior to dropping out and starting his own business. Initially, he had used union labor but had run into problems. He told a story about one young apprentice who would come to work early in the morning, eat his breakfast, and then sit down and do his homework from school. When confronted about his behavior, the apprentice would just say, "I don't know what you niggers really want." (SJ 43-44)
>
> An African American owner of an electrical contracting business testified to having problems with the union labor he used. He stated that he has had white

male employees working for him who "think they know more than I do about what I'm doing and feel like as if I'm supposed to be working with them or for them and not the owner." (SJ 29) He testified that there were no African Americans in the leadership of the Local because they weren't wanted. (SJ 31) He, himself, had attempted to get on the Apprentice Committee to advance the cause of minorities within the Union but had been unable to do so. He said that he had referred five or six young men to the Apprentice Program but that none of them had made it. It was his testimony that the individuals whom he referred more than met the initial qualifications for the Apprentice Program, with three of the prospective apprentices being college students. He suggested the reason they were denied positions was, at least in part, because they were black. (SJ 33)

Another man, an African American representative of a organization of African American electrician journeymen, testified that his organization was formed in an effort to provide an outlet for minority individuals to bring grievances and have some representation in the union. He testified there was a lot of hostility towards blacks inside the unions. (SJ 81)

A woman owner of an underground electrical business testified that unions were generally "hostile and uncooperative" toward women and minorities. (SJ 86) She said that there were only two women in her apprenticeship class of 28 apprentices. When the apprenticeship finished, the union informed the other woman "that since she resided outside of the Local that she would be booked to journey person rather than being book one, which is a local class. However, there were plenty of book one local journeymen who lived outside of the local already and they did not choose to enforce this against them at the time." (SJ 86-87). She stated that the woman tried fighting it for about a year by writing letters, going up and talking to the business agent there, etc., but basically got nowhere. She finally got in touch with someone with some legal background in this area who "got her to write the letter with the right key words and the right names, and all of a sudden, the union management said, 'Oh, well of course she's got to be book one . . . everybody is.' But she didn't work for two and a half years because of this outright discrimination." (SJ 87)

c. Insurance and Bonding

Nineteen witnesses (49 percent) testified about problems satisfying bonding requirements. In some instances this appeared to be the result of business size or capitalization rather than race or gender discrimination, but in other instances, witnesses

testified to more direct links between their inability to obtain bonding and their status as women or minorities.

An African American proprietor of a painting, waterproofing and sandblasting business testified to his difficulty in obtaining liability insurance due to the fact that his business is located in a predominantly minority area: "If you were in a predominantly black area, don't care what city, where it's at, your insurance is going to automatically be higher than anyplace else." (SAM 15)

An African American woman, who was the president of a bonding company, talked about the problems her company has had getting a contract with an insurance company: "I have been in business for 18 years; seven years I have been on my own. And as of today, I do not have a direct contract with an insurance company. Our agency produces over $5 million in insurance premiums in one year, and we still do not have a direct contract. We have a technical assistance contract with the City of Oakland for $57 million, contract management, but we still do not have a direct contract." (SAM 27) She stated that the reason she did not was because of her status as an African American female. She related: "There were five of us who left the industry about the same time, decided to go out on our own; all of them have direct contracts. There was one that left about two years ago; she started off with a direct contract. I'm willing to put up the same $50,000 line of credit." (SAM 35) Each of the four women who has a direct contract is white.

The executive director of Oakland Community Housing related a recent experience where a lender had required a minority contractor to pay more in points to qualify for a bond than nonminority firms typically had to pay. He testified that the bonding premium for a nonminority firm is typically less than 1% while a bond for a minority contractor was in excess of 2%. (GGB 35)

A Filipino owner of a construction company testified that he had attempted to get bonding with the two major bonding companies in San Francisco and had been denied for fifteen years. He attributed the denial to the desire of the bonding companies to support their longstanding customers by hindering their competition. (GGB 57) He finally had to go to San Diego to obtain bonding. (GGB 71)

The woman owner of a construction safety supply company testified that she had used her husband to call people for loans and bonding because he could get things accomplished that she couldn't since he was a white male. She testified that people assume that her husband controls the business rather than her. (SJ 108, 110)

d. Financing

Seventeen witnesses (44 percent) testified about financing difficulties. Again, much of the testimony related to problems faced by small businesses in general, but there were also a significant number of witnesses who attributed their financing difficulties to discrimination.

An African American owner of a backhoe business testified that despite his almost $2 million in liquid assets, banks had refused him financing. He stated that he was aware of a number of majority-owned businesses with the same asset base that had been able to get the line of credit he had been denied. (SAM 127-28)

An African American developer testified that he had used joint ventures to obtain financing because he was not able to obtain financing on his own. In fact, he had done joint ventures with white-owned business enterprises even though their financial situation was not as strong as his because the white-owned businesses could obtain financing. (CC 88-89)

A Filipino American owner of a construction company testified about problems with obtaining financing from banks. In his experience, majority firms with similar finances and assets had been able to obtain loans that he was unable to get. (GGB 64)

An African American who is the vice president of a minority-owned engineering business testified that in one instance a performance bond company had called his bank to certify his creditworthiness, but "that very bank appraised my property, when I bought it for $258,000 three years ago and I had another appraiser come out and appraise the property at $340,000. The bank turned around and appraised my property for $240,000 this year." (GGB 99) He was given this low appraisal despite there having been no physical change or diminution in value of his property and, in fact, despite an increase in the tax-assessed value of the property. (GGB 99-100) He was confident that he was given the low appraisal because he is black. (GGB 107-08)

A Hispanic American owner of a corrosion engineering consulting business testified that he had significant problems obtaining financing for his business. He testified that at first he was denied a loan on the grounds that he did not have any experience. But even after nine years and an excellent track record, his company was still denied the loan. He attributes this to discrimination on the part of the loan officers who are usually white males. (SJ 71-72)

e. Sham Good Faith Efforts

One of the chief concerns among witnesses was what they perceived to be the sham nature of the "good faith" efforts of many majority prime contractors. Sixteen witnesses (41 percent) testified about this problem. Some related being listed as a subcontractor on jobs without permission and to receiving phone calls and certified mail soliciting bids when the prime had no intention of using their services. Others testified about being included on the contract with a public agency to satisfy goals only to have their role diminished, and in some cases altogether discarded, as soon as the work on the contract actually began. The following testimony is illustrative:

> A Pacific Islander woman who ran a trucking business described receiving numerous "good faith letters" requesting her to solicit bids when the prime actually had no intention of using her on the project. (CC 23) She also described prime contractors who had listed her company for certain jobs and then refused to use her company once the job started, finding some excuse like she did not have the right equipment. (CC 25) She said it was "customary" to be listed for work and once the good faith requirements are met, her company is terminated. (CC 26) She also related how certain majority-owned companies would pay a minority business to use the minority company's name on the side of its truck, thereby creating the appearance that the subcontract was being performed by a minority business enterprise. For playing this game, the minority owner is given a small cut of the contract. (CC 37-38)

> Another woman, a certified public accountant who operated her own business, testified that she had been abused by sham efforts several times. On one contract, she had subcontracted to perform certain accounting work. The prime contractor had paid her a portion of the contractual amount, but told her that the audited financial statements necessary for her next task were not yet available. While she waited for the statements, however, the contractor signed a new contract for the purpose of analyzing the very financial statements for which she had been told to wait. The contractor eventually told her that there had been a change of scope in the contract and that her services were no longer needed. (CC 49) On another contract, she was included on the bid for a contract, but after receiving the contract, the contractor said he no longer needed her services. (CC 44-45)

An Asian owner of an engineering company testified to being listed on a job and participating in the interview process. However, when the majority prime got the job, the contractor refused to use the company's services. (CC 105-06)

A Hispanic owner of an electrical distribution business testified about his name being used by general contractors to obtain a contract with no intention of using him on the job at all. He stated: "I would like to talk about also the general contractors . . . using your name, using the company's status as a minority to get the 15 percent or 30 percent preference. And then they get your DBE number and everything else, and they get the award and they don't use you at all." (GGB 26)

The executive director of Oakland Community Housing also described the problem of majority contractors listing minority subcontractors in their bids and then failing to use them on the project. He said that to combat this, his organization has threatened to pull the contracts. (GGB 36-37)

A Filipino owner of a construction company said that he receives calls from general contractors who simply ask him what his address is so that they can make a record that they have attempted to contact minority-owned businesses. (GGB 66) He also regularly receives certified mail from general contractors. When he signs the certified mail, the general contractor is able to use that to show that they have made a good faith effort, despite the fact that there is no real intention of using him on the project. (GGB 59-60)

A Mexican American owner of a paving company testified to several experiences of having been listed "erroneously" by a prime contractor on a project. The prime contractor, in fact, had listed his company only to show minority participation but had no intention of actually using his company on the project. (SJ 17-18) When asked whether he thought it was really just a clerical error, he responded: "No way. Not when they hire another guy right there on the spot five minutes later. Then you have another problem here with . . . this good faith effort all right. These people called about making good faith efforts on these contracts. They write you a letter on the last day of the bid when you—sometimes I even receive it after the bid opening . . . I got one here from Monterey Mechanical which they're asking me to bid a job and this is on Friday evening that they faxed this thing to me. They want the bid Monday morning, and we got the weekend where you can't get any materials, you can't get pricing on anything, and that's your good faith effort." (SJ 21)

An African American owner of an electrical contracting business testified that he receives telephone calls from different contractors asking if he wants to bid a project. "If you want to bid a project, they ask you if you have a fax machine. They'll fax the information. When you get the information, you find out the bid

goes out in a couple of days or the same day or they send you a registered letter, and its after the fact in most cases." (SJ 24-25)

Another African American electrical contractor testified to the same problem: "I have gotten letters from a lot of firms . . . And they generally follow with a telephone call that they want to fax back the letter to them if you'll sign your name so you can say you are not bidding it." (SJ 39) He stated: "they're only after good faith effort. They didn't really want to give a bid." (SJ 39) He also testified that he has had experiences where he is not paid as quickly as the majority subcontractors on a job. (SJ 42)

f. Established Business Networks

Twelve witnesses (31 percent) testified to the problems of overcoming established "old boy" business networks. The following testimony is illustrative:

Speaking of the difficulty of convincing a selection panel that his company could do the job if selected, the African American owner of a construction management business testified: "[M]ore often than not it is also the case we are not on a first name basis with the people who are doing the selecting . . . They all know each other on a first name basis. So the clients are very comfortable with these types of firms." (SAM 46)

The African American owner of a janitorial service company testified that he had difficulty obtaining construction clean-up work: "You will find that most often that is kind of an old boy's network type of situation . . . You get those contracts primarily because you know the construction foreman or superintendent and they have their relationships with each other, their people, their friends or associates or however you want to put it. And normally those are the persons that get those contracts in the construction phase of it. That has been my direct experience in that area. On several occasions." (SAM 84)

A representative from Oakland Community Housing testified: "General contractors essentially select their subs and people they work with over the years. It relates to their relationships are established, particularly with the large general contractors. And I don't think that network has really included minorities." (GGB 39)

g. The Value of Goals Programs

Finally, a number of witnesses expressed their opinion that a significant portion of their revenue was attributable to the goal programs public entities had in place, and that without

such goals their businesses may never have gotten off the ground. The following testimony is illustrative:

> An African American owner of an electrical contracting business testified that at one point he changed the focus of his work from San Jose to Alameda County and San Francisco because the latter had goal programs in place whereas San Jose only had a good faith efforts program. With a mere good faith efforts program in place, he was not getting the opportunities to work. (SJ 35) When asked whether he would have been as successful without minority goals, another African American man who owned a construction management firm responded: "No, I would not be. I would probably--wouldn't even be in business, because when I first got started, it was because the City and County of San Francisco was trying to implement their goals on the San Francisco Clean Water Program."

Such testimony was bolstered by the common testimony of several minority and women witnesses that often the same prime contractor who used them on a project with goals would not even allow them to bid on projects without goals, with no apparent reason related to quality of work.

2. Witness Interviews

The written and telephone interviews performed by NERA revealed similar problems for minority and women business enterprises within the Regional Transit Association's jurisdiction. Individuals spoke about:

- the inability to obtain contracts despite being the low bidder;
- prime contractors who listed their name on bids without their knowledge;
- the difficulty of obtaining bonding and financing;
- prime contractors who would not use their services except on projects with required goals;
- the difficulty of breaking into established business networks;
- the frequent occurrence of receiving notice of opportunities to bid only at the last minute; and
- their experience of being subjected to more intense scrutiny on the job site because of their race.

3. The Second Hearing for the San Francisco Bay Area Rapid Transit District

In addition to its participation in the four hearings conducted by NERA, BART held a separate hearing on September 19, 1992 concerning evidence of discrimination against minority contractors in the Bay Area. This additional hearing was prompted by a contractor's challenge to BART's DBE program. Nineteen individuals testified at the hearing. They expressed concerns in many of the same areas discussed by witnesses at the four other hearings, but with a particular emphasis on their frustration with the "good faith" efforts program. Some of their testimony is summarized below:[95]

> An African American man who is the co-owner of a general engineering and building firm testified that his firm was awarded less than 40 percent of the contracts for which he was the low bidder. He stated that "[t]he reasons why we don't get the jobs are varied, but they all come back to the same thing, and that is the fact that there are disadvantages to being an African American that has the ability to have the low bid, that has the ability to have a bond, has the ability to have insurance, and has the ability to have the working capital. And we wiped out all of those issues with regard to our firm, but we still can't get jobs when we bid on them." (39) He also testified about discrimination in obtaining financing. He stated: "Discrimination exists in the financing industry. And I am a victim of that. If black people can't get financing to acquire assets, then they don't have the assets to use for bonding. If we don't have the assets to use for bonding, then we don't have the bonding to get the work." (42)
>
> A woman, who is the publisher of the black Business Listings newspaper, also testified about sham good faith efforts. She stated she receives certified letters requesting that an ad be placed in her newspaper. However, the letters often come the day before or the day after the bid is due. (94-95) She testified of an instance where a contractor called her about placing an advertisement in the paper, but because her newspaper is published monthly there was not sufficient time. She informed him that she could not place the advertisement but that if he would call back in a couple of days, she would find a minority subcontractor for him. The person declined but said "well, I want to still put your name down as a person I called." (98)

[95] Transcript pages are in parentheses.

An African American man who owns an estimating company testified that he had experienced situations in which he was listed as a subcontractor only to have the prime reduce the scope of work. It was his opinion that the scope of work was reduced on the basis of his race. (69-70)

An African American woman who, along with her husband, owns an excavating and paving company testified that she gets phone calls from prime contractors three hours before the bid is due without any notice or even asking if she was bidding. "They don't care, but I am the right color. They need a bid from a minority contractor. But that is as far as it goes." (74) She also testified to having been subjected to bid shopping practices. She related that on a recent BART project, the contracting officer requested that she get her bid in two weeks before the bid date along with a scope letter. She stated that none of the other contractors needed to get their bids in two weeks before the bid date and that the purpose of requesting the early submission was to shop her bid. (77-78)

An African American owner of a construction company testified that the good faith efforts program was "the biggest joke I have ever heard." (102) He related how some contractors "have computerized methods of shooting out 2,000 letters through the computers to minority contractors with the intent of not using one minority contractor." (103)

One general contractor testified that there was "a long history of minority contractors versus BART." He said that he had been involved with BART "since the first shovel of dirt was turned over." He testified that "[t]he National Association of Minority Contractors was formed as a result of our inability to get work on the BART system." (30) He testified that a good faith efforts program was ineffective in increasing minority participation. He stated: "Good faith effort is meaningless, absolutely meaningless. I can't imagine anybody in this day and age who is serious about employing minority contractors, spending time and money and energy on a good faith effort. That doesn't produce any results." (31)

The woman owner of a trucking business testified "[a]s far as discrimination in trucking, you really don't have to ask us anything. If you drive down any street in Oakland, you see exactly what is happening. Same Caucasian companies on all of the jobs. There is not minorities on them. If there is, they will keep those for a day or two, and then they will say there is no work and will replace us with someone else, or they will give us the job that lasts for four hours a day, you know, things like that." (109)

D. Evidence from Other Hearings and Interviews in the Bay Area

Because the RTA includes such a broad portion of the Bay Area, the direct evidence of discrimination gathered for other Bay Area entities is valuable in discerning the presence or absence of discrimination within the jurisdiction of the RTA. Thus, in this section, we summarize some of the evidence presented at the public hearings conducted by other entities in the Bay Area—Alameda and Contra Costa Counties, San Francisco, and Hayward. This additional evidence indicates similar problems with discrimination, as described above, within the RTA's jurisdiction.

1. Hearings in Alameda and Contra Costa Counties and San Francisco

NERA conducted one public hearing in San Francisco, and four in Alameda and Contra Costa Counties.[96] Sixty-one witnesses presented testimony in person or in writing. Forty-two witnesses (69 percent) were African American, eight were Hispanic (13 percent), and seven were Asian (11 percent). Among the remaining, two were white women and two were white men. Six of the minority witnesses were women, for a total of eight women testifying (13 percent). The following is a summary of their comments taken from our reports for these counties.

a. Overview of Discrimination

In a few cases, the witnesses attested to overt discriminatory statements:

> The CEO for a minority construction firm specializing in general engineering and building stated that he had white workers tell him, "I just don't work for black people."

[96] The Alameda and Contra Costa hearings were conducted on behalf of the county governments. The San Francisco hearing was conducted on behalf of the San Francisco Redevelopment Agency.

One woman architect interviewed stated, "When I start to call firms to be a part of their team, they say they are just not going to have any woman-owned business on their team."

The female owner of a firm which performs land use and environmental impact studies recalled an experience she had working as a subcontractor in 1985 in Alameda County. She stated that her team met with three men representing the city. These men told her in a hostile and attacking manner that they did not wish to hire her team, which was two-thirds female. The team eventually hired was composed of white men.

b. Bonding

Twenty percent of the witnesses testifying cited specific problems with bonding. Many witnesses complained that bonding agents discriminated against minority firms both by charging them higher bond rates and more frequently rejecting them than was the case with comparable majority firms. For example:

An African American woman, president of an Oakland-based insurance company specializing in commercial insurance for bonding, stated that discrimination in writing surety bonds exists against African Americans. She said, "If I have an application from a white contractor and an African American contractor and I submit both applications at the same time and the applicants are equally qualified, I receive my response back on the white contractor first." She added that this time delay often constitutes a denial. She also reported that in terms of payment for bonds, minorities usually pay two points higher than their majority contractor counterparts.

Another African American surety writer stated that only a few bonding surety underwriters practice in the Bay Area, so contractors have a limited number of sources. This means that all contractors and surety writers know each other. Majority contractors, doing a majority of the work, can say, "Don't write that contract for that African American contractor, or do not increase his credit line" because, at that point, the minority contractor will become a competitor.

An African American electrical contractor noted, "Bonding is a problem for minority contractors. Many times, I am a subcontractor because I cannot get the bonding to be the prime contractor."

Another minority electrical contractor testified that he had submitted all the necessary information for a bond of approximately $3 million. He had received

hitect and what would be required for the project, yet the architect wouldn't
ak to any other bidders. So again, it's a social thing.'

e president of an African American-owned engineering firm who had a
ent project with Contra Costa County stated that the prime contractor who
the bid subcontracted for his firm to perform 20 percent of the contract
ie. After the Croson ruling, the prime wanted them to perform more than
percent of the actual work at less than 20 percent of the cost. They declined.
a consequence, the prime disqualified their firm.

: president of a consulting firm and officer of the Association of Asian
ians stated that prior to the Croson ruling, he had been negotiating with
eral large companies to perform as subconsultants on projects and they were
close to reaching an agreement. After Croson, the companies terminated
otiations because there were no longer requirements of minority
icipation.

e. Unions

umber of witnesses identified historic union discrimination as a major limitation to

on and success of minority firms.

Director of the Richmond Community Outreach Program testified that
nduals seeking to enter a certain construction industry craft must first excel
standardized aptitude test that is known to effectively function as a
ening and weeding-out device for minorities and women.

president and proprietor of an African American-owned surveying and
ping firm testified that after he was awarded a surveying project, he was
d off the job because union surveyors discriminatorily protested the fact
he had gotten the job.

frican American electrician stated that after being trained in the military,
as denied union membership many times. At that time, only three African
ricans had acquired journey plates in the local electricians union for
ieda County.

frican American welding contractor stated that the only way a "black kid"
et into an apprenticeship program is to have someone sponsor him. While
in the trades 26 years, he had only been able to participate on two union
cts and sponsor two African American apprentices.

An African American woman with the Contra Costa County Black Chamber of Commerce is responsible for the business development and procurement program, which focuses on woman-owned and minority-owned small businesses in Contra Costa County. The woman stated that, based on the complaints that she had heard from minority and woman business owners, the worst cases of discrimination occur in construction, public works and architectural services.

An African American CEO of an engineering firm stated in an interview that while his design had been selected as the lowest bid for the project, he was not awarded the contract. The public entity sought a large white firm to implement the design.

f. Suppliers

Some witnesses also identified discrimination by suppliers as an obstacle:

A CEO for a minority-owned construction firm specializing in general engineering and general building and director for the California Chapter for the Minority Contractors Association stated, "On one job I was given the opportunity to work on a time and material basis. When I pulled out my quotes from suppliers and compared them to the primes quotes from the same supplier, the supplier quoted the white prime 10 percent to 15 percent lower prices than mine."

A woman supplier who was interviewed stated that she was denied membership in an all-male wholesale buyers association. Also, some of the wholesale suppliers refused to sell to her because she was not a member of the group.

An African American trucker complained that he paid much more for tires than did majority firms.

2. The Hearing in the City of Hayward

Twelve people testified at a public hearing in Hayward.[98] Seven of the witnesses (58 cent) were African American and five (42 percent) were Hispanic. Three African erican women (25 percent) testified at the hearing. The witnesses at the Hayward hearing ed many of the concerns discussed above. Their responses are summarized below.

[98] The Hayward hearing was conducted on behalf of the City.

a. Bonding

Forty-two percent of the witnesses testifying cited problems with bonding both as an effect of disparate treatment and as evidence of disparate impact. For example:

> In response to an inquiry whether bonding had been a problem for his company, the operator and owner of an electrical company stated, "Yes, it has been a problem. I think it has been an age old problem for all minorities, not just myself. I think the bank, when it comes to minorities—like I say, you are treated on a different criteria."
>
> A female African American owner of a company providing insurance and bonding services stated that her firm was not offered rates as low as provided to majority-owned firms. This resulted, she said, in her firm not being able to provide her clients, many of whom were minorities, with bond rates comparable to those received by clients of majority firms. The same owner stated that of two equally qualified companies seeking bonding, one white-owned and the other minority-owned, the race of the applicant will be used to determine whether to award the bond. She added that she had experienced a situation where "the subcontractor was allowed to bid without a bond and the minority contractor who was awarded that contract, he would be required to get a bond or not get the job without bonding."

b. Financing

Seventeen percent of the witnesses testifying cited problems in obtaining financing, and attributed these problems to discrimination. For example:

> The owner of an electrical company stated that race played a major role in his difficulty in obtaining financing. He said, "If I go to try to obtain a loan, then I am having to deal with different criteria than my competitor is going to have to deal with."
>
> The president of a construction management and civil engineering firm stated that he had to mortgage his home to obtain a loan, which he believed was an extraordinary measure given his company's financial well-being.

c. Business Networks

Seventy-five percent of the witnesses testifying cited problems breaking into established business networks. Many of the witnesses believed their difficulty breaking into these networks was the result of their race or gender. For example:

> The owner of a direct mail service based in Hayward stated that he did not receive the same "privilege" of an open purchase order, because of "the old boy and old girl network. It certainly isn't Black American."
>
> The owner of a printing service testified that such business networks play a greater role in the public than in the private sector, because the profit motive in the private sector is a greater disincentive to discrimination.
>
> The president of a surveying and mapping company stated, "[A] black man will rarely achieve the relationship that two white men will develop. It is just not there. We can talk about relationship all day long but contractors are not going to be as buddy-buddy with a black subcontractor as they are with a white subcontractor." He added that he'd be told, "We already got our people." people chosen because of their membership in the old boy network.
>
> The president of a construction management and civil engineering firm stated, "There is a very definite, specific network out there. If you want to call it old boy network old girl network, call it whatever you want, there is a camaraderie that is built up in the construction industry that I think is perhaps unique."

d. Sham "Good Faith" Efforts

Twenty-five percent of the witnesses testifying expressed frustration with "good faith efforts" on the part of general contractors to use minority subcontractors. The witnesses testified that contractors would appear to make these "good faith efforts," only later to inform the minority subcontractor that its bid was in some way unacceptable, even if it were the low bid. For example:

> The owner of an electrical company stated that when a good faith effort is sufficient to meet the minority preference guidelines, the general contractors "can come along and tell us that we are too low or too high. We don't have the experience. We weren't able to get the bonding letters, all sorts of things." This

owner stated that he believed it fairly common that the low bidder on a job, if a minority, would not receive the award. "Over the past year I bid in excess of over twenty million dollars in which I was the low bid and I didn't receive [the awards]."

The president of a construction management and civil engineering firm stated, "as far as our firm is concerned, if there is a good faith effort, it kind of disappears. It doesn't happen." He cited one example where his bid was lowest but he was not awarded the contract, despite the fact that his was the only minority firm bidding. The firm which received the award was not a minority business.

3. San Francisco Board of Supervisor Hearings

The San Francisco Board of Supervisors also has held several hearings in 1989, and many MBEs gave written and oral testimonies, complaining that discriminatory practices excluded them from prime contracts with the City of San Francisco. Some of that testimony included facts indicating that MBEs were denied prime contracts despite being the low bidder. In other cases, qualified MBE firms were told they were not qualified, but were awarded contracts when an independent evaluator reviewed the proposals.

City staff reported evidence of discrimination which included the testimony of the Contract Compliance Liaison Officer. The Liaison Officer stated that minorities were not welcome at the Port of San Francisco and that attitudes existed that minorities were incompetent and could not perform the highly technical work that the Port requires. There was also testimony to the effect that there was and is a general program of harassment of minority contractors by the staff of the Port of San Francisco. Additionally, MBEs complained that white prime contractors would list them on their bid proposals, but then replace them with white subcontractors after being awarded the contract. One MBE testified that he called a

white broker concerning construction work on a City project and was told, "We don't need any minorities."[99]

4. City and County of San Francisco Sunset Report

To determine whether the City and County of San Francisco could extend its Minority/Women/Local Business Ordinance beyond the initial sunset date of June 30, 1992, the Human Rights Commission of San Francisco held three public hearings and received written testimony. Based on the evidence received, the Commission concluded that the ordinance could be extended. Summary digests of the testimony received were included in a report titled "Sunset Report," dated February 28, 1992. Several of those digests reveal the same kind of problems and concerns raised at other hearings: sham good faith efforts, old boy networks, overt discrimination, problems obtaining bonding and insurance, and the value to woman and minority-owned businesses of preference programs.

5. City of San Jose Hearings

In the course of completing an M/WBE Disparity Study in 1990, consultants to the City of San Jose conducted over 200 interviews with minority and woman-owned businesses.[100] These interviews produced evidence similar to that collected in the Regional Transit Association, Alameda, Contra Costa, Hayward, and San Francisco hearings. The interviews demonstrated a perception on the part of minority and woman-owned firms that discrimination remains widespread in both the public and private sectors. Chief among the specific forms of discrimination identified were discriminating practices of prime contractors

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[99] AGC v. San Francisco, supra at 1450-1452.

[100] BPA Economics, Mason Tillman Associates, and Boasberg and Norton, "MBE/WBE Disparity Study for the City of San Jose," Final Report, 1990, Volume II.

and bonding agents. The practices of prime contractors generally related to efforts on the part of primes to avoid using minority and women-owned firms even if good faith hiring efforts were required by government agencies. These efforts included: making bid changes after contract award, substituting majority subcontractors after project award, bid snopping, providing insufficient lead time for bidding, and listing minority firms without approval.

These allegations were supported by a review of the City's contract records. For example, in 14 of 97 contracts reviewed, the minority firms listed were not actually used and were unaware they had been listed.

E. Evidence from Cases Filed and Decided

This section summarizes several state and federal court cases, decided since 1976, that reflect the presence of discrimination in the San Francisco Bay Area. While these cases typically reflect discrimination by a single employer or agency, in the aggregate, they suggest discrimination is a continuing problem and give additional credence to the other statistical and direct evidence that show a problem with discrimination.

In Alameda County, for example, a federal court upheld the Oakland Unified School District's Affirmative Action Plan applicable to general contractors who submitted bids for school construction contracts.[101] The Court found that the school district was not attempting to remedy societal discrimination, but instead the "effect of past discrimination in one particular industry . . . school construction contracts."[102] The Court relied on affidavits and statistics which showed that "from 1947 until adoption of the Affirmative Action Plan in

[101] Schmidt v. Oakland Unified School District, 662 F.2d 550 9th Cir. (1981).

[102] Id. at 558.

1975, the School Board awarded 135 construction contracts for amounts of at least $100,000 each. Of the 135, only one was awarded to a minority contractor."[103]

A number of other construction cases also show that a discriminatory climate has existed for a number of years in the local construction trades. In Ellis v. Naval Air Rework Facility,[104] the court, in resolving several tangential procedural issues, described a consent decree between 2,500 minority plaintiffs and their employers--the Naval Air Rework Facility and the Naval Air Station in Alameda. The Court described the decree as "providing not only relief from harsh discriminatory working rules, but also providing individual relief to certain class members . . . for past wrongs."[105]

In U.S. v. Local Union No. 3, International Union of Operating Engineers,[106] another Bay Area case, the Court found that the Union had violated Title VII by discriminating in the admission of minorities into apprenticeship programs and other training positions, as well as by placing minorities on various referral lists for journeymen employment.[107] Although the Court found that the general population of Northern California had, at the time, a racial and ethnic composition of 7 percent African American, 15.5 percent Hispanic, and 26.2 percent total minority, Local Union No. 3 had only 0.8 percent African American members and 4.4 percent Hispanic members. Of 385 total apprentices, only 51, or 13.2 percent, were minorities. The Court stated that the exclusive hiring hall and job

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[103] Id. at 559.

[104] 37 F.R.D. 15 (N.D. Cal 1980) aff'd without op., 661 F.2d 939 (9th Cir. 1981).

[105] Id. at 17.

[106] 4 Empl. Prac. Dec. (CCH) 6500 (N.D. Cal. 1972).

[107] Id. at 6501.

referral system played a significant role in perpetuating what the Court concluded were discriminatory employment practices of the Union.[108]

In EEOC v. Local 38,[109] the court found that Local 38 of the United Association of Journeymen and Apprentices of Plumbing and Pipe-Fitting Industry, AFL-CIO, violated the terms of a consent decree by refusing to admit a certain number of minority apprentices. The Union's jurisdiction included the Bay Area. For purposes of the consent decree, population parity was defined as 9 percent African Americans, 8 percent Asians, and 11 percent Spanish-surnamed Americans. Between 1977 and 1979, however, the minority membership of Local 38 was only 2.3 percent African American, 8 percent Spanish-surname, and 2.9 percent Asian.[110]

In 1977, the U.S. District Court for Northern California issued a consent decree in EEOC v. Local 378[111] extending an order first issued in 1971 directing the International Association of Bridge, Structural, and Ornamental Iron Workers througnout California to continue and extend affirmative action programs. The court directed that the Union's apprenticeship program in San Francisco and San Jose admit the higher of 13.6 percent or 5 African Americans, and the Union's Oakland program admit the higher of 35 percent or 20 African Americans.

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[108] Id.

[109] 28 Fair Employment Practice Case (BNA) 1567 (N.D. Cal. 1981).

[110] Id. at 1572.

[111] Equal Employment Opportunity Commission v. Local 378, International Association of Bridge, Structural, and Ornamental Iron Workers et. al., U.S. District Court, Northern California, Civil Action No. 71-984.

Another such decree was entered by the district court in 1977 regarding EEOC v. Sheet Metal Workers International Association, Local 104.[112] The court directed the local union to adhere to an apprentice hiring timetable which called for a minimum of 50 percent of apprentices to be minority until Union membership reached "population parity."

Yet another union/construction discrimination case, this one involving women, is Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee.[113] In Eldredge, the Ninth Circuit concluded that the Apprenticeship and Training Committee violated Title VII by admitting an inadequate number of women into the apprenticeship program. Although the union covers all of Northern California, the evidence of its discriminatory practices is indicative of construction union discrimination in the Bay Area. The evidence submitted by the plaintiff demonstrated a substantial disparity between genders in apprenticeship levels. Aggregated over a nine-year period, from 1976 through 1984, the admission rate for women as a percentage of women applicants was substantially lower than the admissions rate for males.

The discriminatory impact of the type of employment discrimination evidenced by these various cases goes beyond individual unions and employers. To operate a successful business, an individual must not only have considerable expertise in the industry in which the business is operating, but also more general expertise in managing employees and finances. The obvious way to gain this expertise is to obtain relevant work experience before starting a

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[112] Equal Employment Opportunity Commission v. Sheet Metal Workers International Association Local 104, United States District Court, Northern District of California, No. C76-2427 WAI.

[113] 833 F.2d 1334 (9th Cir. 1987), cert. denied 487 U.S. 1210, 108 S.Ct. 2857 (1980).

business. Since minorities and women historically have suffered discrimination in the construction industry and its apprenticeship and training programs, they have also been denied the general experience which would aid them later in managing their employees and finances. Minorities and women who are denied employment in particular industries probably never will operate businesses in those industries.

The discrimination reflected in the construction industry cases is also reflected in other areas of employment. In Martinez v. Oakland Scavenger, Co.,[114] for example, the district court concluded that Oakland Scavenger, a garbage collection company, had plainly and severely discriminated against African American and Hispanic employees. The court made the following findings:

1. The best jobs in the company were overwhelmingly held by whites, for reasons which were not justified by racially neutral employment considerations.

2. All shareholder employees were white and received higher pay and guaranteed overtime for the same work performed by the minority employees.

3. No minority employee had the opportunity to become a shareholder and hence to have access to better jobs and higher pay.

4. The company system for updating jobs was riddled with exceptions, used for the benefit of the white employees.

5. The casual pool was operated in a discriminatory manner.

6. There were numerous acts of intentional racial discrimination, which created a racially discriminatory atmosphere within the company.

[114] 680 F. Supp. 1377 (N.D. Cal. 1987).

There is also evidence of discrimination in the food services industry. In The Legal Aid Society of Alameda County v. Brennan,[115] several African American residents of Alameda County sued the United States Department of Agriculture (USDA). The complaint alleged USDA had failed to enforce an executive order requiring food processing contractors contracting with the federal government to develop an affirmative action plan to ensure that the workforce composition was equitable.[116] The Ninth Circuit affirmed the district court's decision to enjoin the USDA officials from approving ten Alameda County programs which violated the applicable regulations.[117] While the failure of the ten food service contractors to institute affirmative action programs may not be the most powerful evidence of purposeful discrimination, their unwillingness to comply with a federal regulation, combined with the USDA's unwillingness to enforce that regulation, indicates that discrimination exists in the food processing industry in the County. The court noted that "contemporary compliance reviews reflected underutilization of African Americans by 70 percent of the Alameda County food processing contractors, and systematic underutilization of blacks both overall in every job category by more than 1/3 of such contractors." Numerous statistics exemplified this underutilization. For example, a national beverage company had one African American employee in a workforce of 154, or 0.6 percent utilization. A large dairy products company had four African American employees of 315 in the workforce (1.2 percent), with utilization at zero percent in several categories and no higher than 6 percent in any. A national meat

[115] 608 F.2d 1390 (9th Cir. 1979), cert. denied 447 U.S. 921, 100 S.Ct. 3010 (1980).

[116] Id. at 1325-27.

[117] Id. at 1327.

products company and a condiments company had no African American employees whatsoever. Another firm had one African American employee of 48 (2 percent) overall and of 23 (4.3 percent) in the semi-skilled operatives categories, and all other categories showed zero percent utilization.[118]

Another case reflecting discrimination is Pate v. Alameda-Contra Costa Transit District.[119] There, the court found that the transit district had "discriminated against black persons in the hiring of clerical, maintenance, and non-union employees and against black employees in training for promotion to non-union positions."[120] The impact of this finding of discrimination is not limited to the transit district. Many employment skills, especially skills in management, are transferable from one job to another. Minorities who are denied promotions, especially to managerial positions, will have fewer of the skills needed to operate any business. They, in turn, will be less likely to open a business and if they do, may well have a less successful business than if they had not suffered discrimination.

A final, recent case reflecting relevant discrimination is Walnut Creek Manor, et al., v. Fair Employment and Housing Commission.[121] In that case, the California Supreme Court reduced the amount of damages awarded on a successful claim of racial discrimination in housing, but did not disagree with the dissent's observation that evidence of discrimination in housing persists:

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[118] Id.

[119] 21 Fair Empl. Prac. Cas. (BNA) 1228 (N.D. Cal. 1979).

[120] Id. at 1230.

[121] 54 Cal.3d 245, 284 Cal. Rptr. 718, 814 P.2d 704 (1991).

> Segregated housing patterns, which frequently confine minority groups to substandard housing, persist in many areas in California . . . . Although low income undoubtedly prevents many minority group members from obtaining better housing, this case vividly demonstrates that discrimination on racial and other grounds continues to prevent individuals from obtaining housing they can well afford.[122]

While at first glance the link between housing discrimination and discrimination in construction and other procurement areas may appear tenuous, it is not. The ability to secure a business loan often depends on the personal assets of the applicant. If minority individuals are redlined out of nicer housing areas, their homes will not appreciate or even retain their value, denying them the collateral to secure a loan. Discrimination in housing, therefore, affects not only the personal choices of persons suffering discrimination, but the viability of their businesses as well.

The case law, then, lends credence to the direct and statistical evidence suggesting a problem with discrimination in the RTA's contracting jurisdiction.

F. Evidence From M/WBE Survey

To obtain anecdotal evidence of discrimination, NERA surveyed 4,817[123] M/WBEs. The surveys were tailored to the three major procurement areas: construction, personal and professional services, and commodity purchasing. The mailing was sent out to all M/WBEs identified in our master M/WBE directory, which contains a unique listing of the minority and/or woman business enterprises located within the RTA's geographic market area.

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[122] Id. at 277, 284 Cal. Rptr. at 737.

[123] This figure excludes any surveys that were returned undelivered and those responses that were received too late to be included in the analysis.

We received responses from 502 firms (10.3 percent), of which 46.2 percent stated that they had secured or attempted to secure a contract with RTA member agencies. As shown in Table 5.2, overall, 36.9 percent of all those who responded to the discrimination questions indicated that they had experienced at least one instance of discrimination within the last two years in one or more areas of business dealings identified in the surveys. African Americans reported the highest rate of discrimination, with 57.7 percent of the 85 African American respondents indicating that they had encountered discrimination. The incidence of discrimination is similar across the three major procurement areas: 37.7 percent for personal/professional service firms, 35.9 percent for construction firms and 35.0 percent for purchasing firms. Each survey asked respondents to indicate whether they had experienced discrimination in various business dealings and bid requirements. A summary of these responses for the question concerning obtaining commercial credit, for example, is summarized in Table 5.3. This table shows that, overall, 52 percent of African American firms and 33 percent of all M/WBE construction firms reported discrimination in this area. Tables 5.2a and 5.3a show similar responses for those M/WBE firms surveyed which indicated that they have had dealings with the RTA member agencies. The following is a more detailed discussion of the survey results by major procurement category.

1. Construction Survey

We received responses from 14.2 percent of the M/WBE construction firms that were surveyed. Table 5.2 shows that, overall, 35.9 percent of the 53 valid respondents to the discrimination questions indicated that they had experienced at least one instance of discrimination in the last two years. As is the case for all three procurement categories

Table 5.2

PERCENT OF RESPONDENTS THAT REPORTED AT LEAST ONE INSTANCE OF DISCRIMINATION IN THE LAST FIVE YEARS

(Number of valid responses in parentheses)

Race/Gender Group	Construction	Professional Services	Purchasing	Total
African American	83.33% (6)	55.88% (68)	54.55% (11)	57.65% (85)
Hispanic	21.43% (14)	47.22% (36)	15.38% (13)	34.92% (63)
Asian	18.18% (11)	27.16% (81)	20.69% (29)	24.79% (121)
Total WBEs	38.46% (26)	35.03% (157)	46.77% (62)	38.37% (245)
TOTAL	35.85% (53)	37.71% (297)	34.95% (103)	36.87% (453)

Table 5.2a

PERCENT OF RESPONDENTS THAT REPORTED AT LEAST ONE INSTANCE OF DISCRIMINATION IN THE LAST FIVE YEARS

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Race/Gender Group	Construction	Professional Services	Purchasing	Total
African American	100.00% (4)	70.59% (34)	0.00% (3)	68.29% (41)
Hispanic	37.50% (8)	40.91% (22)	16.67% (6)	36.11% (36)
Asian	33.33% (3)	33.33% (42)	26.67% (15)	31.67% (60)
Total WBEs	60.00% (10)	40.51% (79)	27.27% (22)	39.64% (111)
TOTAL	56.52% (23)	40.79% (152)	20.00% (45)	38.18% (220)

Table 5.3

PERCENT OF RESPONDENTS THAT REPORTED AT LEAST ONE INSTANCE OF DISCRIMINATION IN OBTAINING COMMERCIAL CREDIT IN THE LAST FIVE YEARS

(Number of valid responses in parentheses)

Race/Gender Group	Construction	Professional Services	Purchasing	Total
African American	83.33% (6)	48.28% (58)	54.55% (11)	52.00% (75)
Hispanic	15.38% (13)	40.63% (32)	15.38% (13)	29.31% (58)
Asian	18.18% (11)	18.06% (72)	20.69% (29)	18.75% (112)
Total WBEs	36.00% (25)	28.17% (142)	32.20% (59)	30.01% (226)
TOTAL	33.33% (51)	31.23% (269)	26.00% (100)	30.24% (420)

Table 5.3a

PERCENT OF RESPONDENTS THAT REPORTED AT LEAST ONE INSTANCE OF DISCRIMINATION IN OBTAINING COMMERCIAL CREDIT IN THE LAST FIVE YEARS

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Race/Gender Group	Construction	Professional Services	Purchasing	Total
African American	100.00% (4)	61.54% (26)	0.00% (3)	60.61% (33)
Hispanic	28.57% (7)	38.10% (21)	16.67% (6)	32.35% (34)
Asian	33.33% (3)	26.32% (38)	26.67% (15)	26.79% (56)
Total WBEs	55.56% (9)	31.88% (69)	25.00% (20)	32.65% (98)
TOTAL	52.38% (21)	34.31% (137)	18.60% (43)	32.84% (201)

surveyed, the highest rate of discrimination in the construction industry was reported by African Americans (83.3 percent), followed by women (38.5 percent), and Hispanics (21.4 percent). Asian respondents reported discrimination 18.2 percent of the time. Table 5.4 presents a summary of survey responses of those construction firms that indicated they had experienced discrimination. At least 80 percent of the African Americans who experienced discrimination asserted disparate treatment in each of the following business dealings: applying for commercial loans, bonds, and insurance; receiving requests for bids; and in their business dealings with unions, trade associations and suppliers. Approximately 16 percent of Hispanics, 18 percent of Asians, and one-third of women-owned construction firms reported discrimination in each of these business dealings. Evidence of discrimination for Native Americans is rather limited.[124]

In our surveys, we also asked questions pertaining to bid requirements in order to determine which requirements were perceived as serious impediments in the bidding process. Firms were asked to rate the bid requirements on a scale of 2 through 5,[125] 2 meaning that the requirement helped them get work, 3 that it had no effect, 4 that it made it harder, and 5 that the requirement made it impossible to obtain an award. Table 5.5 shows that African Americans and women indicated that obtaining working capital and large project size are the most serious bid impediments. Of those who provided valid responses to the question, 66.7 percent of African Americans and 57.9 percent of women indicated that the ability (or lack thereof) to obtain working capital made it harder or impossible to obtain an award. An equal

[124] We received only one valid response from Native American construction firms.

[125] Firms could also rate the requirement 1, which means that they had no experience with the particular bid requirement. These responses were excluded from the analysis.

CONSTRUCTION FIRM RESPONDENTS WHO INDICATED THAT THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

(Number of valid responses in parentheses)

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	83.33% (6)	15.38% (13)	18.18% (11)	36.00% (25)
Applying for a bond	83.33% (6)	21.43% (14)	18.18% (11)	36.00% (25)
Applying for commercial insurance	83.33% (6)	21.43% (14)	18.18% (11)	36.00% (25)
Attempting to hire workers from union hiring halls	83.33% (6)	8.33% (12)	18.18% (11)	36.00% (25)
Obtaining quotes from suppliers	83.33% (6)	15.38% (13)	18.18% (11)	36.00% (25)
Receiving requests for bids	83.33% (6)	15.38% (13)	18.18% (11)	33.33% (24)
Applying for membership in trade associations	80.00% (5)	15.38% (13)	18.18% (11)	36.00% (25)
Other dealings with trade associations	80.00% (5)	8.33% (12)	18.18% (11)	36.00% (25)
PRIME CONTRACTS:				
Bidding on prime contracts [in total]	80.00% (5)	15.38% (13)	18.18% (11)	27.27% (22)
Working on prime contracts [in total]	80.00% (5)	15.38% (13)	18.18% (11)	30.43% (23)
Receiving payments for prime contracts [in total]	75.00% (4)	15.38% (13)	18.18% (11)	30.43% (23)
SUBCONTRACTS:				
Bidding on subcontracts [in total]	80.00% (5)	15.38% (13)	18.18% (11)	33.33% (24)
Working on subcontracts [in total]	80.00% (5)	15.38% (13)	18.18% (11)	33.33% (24)
Receiving payment for subcontracts [in total]	80.00% (5)	15.38% (13)	18.18% (11)	33.33% (24)

Table 5.4a

CONSTRUCTION FIRM RESPONDENTS WHO INDICATED THAT THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)
Applying for a bond	100.00% (4)	37.50% (8)	33.33% (3)	55.56% (9)
Applying for commercial insurance	100.00% (4)	37.50% (8)	33.33% (3)	55.56% (9)
Attempting to hire workers from union hiring halls	100.00% (4)	16.67% (6)	33.33% (3)	55.56% (9)
Obtaining quotes from suppliers	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)
Receiving requests for bids	100.00% (4)	28.57% (7)	33.33% (3)	50.00% (8)
Applying for membership in trade associations	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)
Other dealings with trade associations	100.00% (4)	16.67% (6)	33.33% (3)	55.56% (9)
PRIME CONTRACTS:				
Bidding on prime contracts [in total]	100.00% (3)	28.57% (7)	33.33% (3)	42.86% (7)
Working on prime contracts [in total]	100.00% (3)	28.57% (7)	33.33% (3)	50.00% (8)
Receiving payments for prime contracts [in total]	100.00% (3)	28.57% (7)	33.33% (3)	50.00% (8)
SUBCONTRACTS:				
Bidding on subcontracts [in total]	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)
Working on subcontracts [in total]	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)
Receiving payment for subcontracts [in total]	100.00% (4)	28.57% (7)	33.33% (3)	55.56% (9)

Table 5.5

Table 5.5

CONSTRUCTION FIRM RESPONDENTS WHO INDICATED THAT
BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

(Valid number of responses in parentheses)

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Bonding Requirements	50.00% (6)	41.67% (12)	40.00% (10)	41.18% (17)
Obtaining Working Capital	66.67% (6)	40.00% (10)	40.00% (10)	57.89% (19)
Cost of Completing Proposals	16.67% (6)	30.00% (10)	40.00% (10)	33.33% (18)
Notification Deadlines (for bids, bonding, and insurance)	0.00% (6)	18.18% (11)	20.00% (10)	16.67% (18)
Insurance Requirements	16.67% (6)	33.33% (12)	10.00% (10)	15.00% (20)
Project Size	60.00% (5)	41.67% (12)	40.00% (10)	57.89% (19)
Prequalification Requirements	33.33% (6)	20.00% (10)	10.00% (10)	21.05% (19)
Previous Dealings with Agency	50.00% (4)	11.11% (9)	16.67% (6)	10.00% (10)

Table 5.5a

CONSTRUCTION FIRM RESPONDENTS WHO INDICATED THAT
BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Bonding Requirements	75.00% (4)	37.50% (8)	33.33% (3)	30.00% (10)
Obtaining Working Capital	75.00% (4)	25.00% (8)	33.33% (3)	60.00% (10)
Cost of Completing Proposals	25.00% (4)	25.00% (8)	33.33% (3)	10.00% (10)
Notification Deadlines (for bids, bonding, and insurance)	50.00% (4)	12.50% (8)	33.33% (3)	20.00% (10)
Insurance Requirements	0.00% (4)	37.50% (8)	0.00% (3)	10.00% (10)
Project Size	75.00% (4)	37.50% (8)	66.67% (3)	50.00% (10)
Prequalification Requirements	50.00% (4)	25.00% (8)	0.00% (3)	20.00% (10)
Previous Dealings with Agency	50.00% (4)	12.50% (8)	0.00% (3)	10.00% (10)

Table 5.5a

CONSTRUCTION FIRM RESPONDENTS WHO INDICATED THAT
BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Bonding Requirements	75.00% (4)	37.50% (8)	33.33% (3)	30.00% (10)
Obtaining Working Capital	75.00% (4)	25.00% (8)	33.33% (3)	60.00% (10)
Cost of Completing Proposals	25.00% (4)	25.00% (8)	33.33% (3)	10.00% (10)
Notification Deadlines (for bids, bonding, and insurance)	50.00% (4)	12.50% (8)	33.33% (3)	20.00% (10)
Insurance Requirements	0.00% (4)	37.50% (8)	0.00% (3)	10.00% (10)
Project Size	75.00% (4)	37.50% (8)	66.67% (3)	50.00% (10)
Prequalification Requirements	50.00% (4)	25.00% (8)	0.00% (3)	20.00% (10)
Previous Dealings with Agency	50.00% (4)	12.50% (8)	0.00% (3)	10.00% (10)

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percentage of women reported difficulty with large projects, and 60 percent of African American respondents report project size to be a serious bid impediment. Hispanics report their greatest degree of difficulty with bonding requirements and large project size, with 41.7 percent of respondents reporting difficulty in each of these areas. Finally, 40 percent of Asian construction firms reported bonding requirements, obtaining working capital, the cost of completing proposals and project size as impediments to obtaining an award. Tables 5.4a and 5.5a show similar survey responses for those M/WBE construction firms surveyed which have had dealings with the RTA member agencies.

2. Personal/Professional Services Survey

We received 332 responses to our personal/professional services survey, a response rate of approximately 10 percent.[126] Table 5.2 shows that, overall, 37.7 percent of the respondents stated that they were discriminated against. African Americans reported the highest rate (55.9 percent), followed by Hispanics (47.2 percent), women (35.0 percent) and Asians (27.2 percent). Table 5.6 summarizes the business dealings in which M/WBE firms felt they had experienced discrimination. Of these categories, the most often mentioned was discrimination in receiving Requests for Proposals. In this area, 51.6 percent of African Americans, 40.6 percent of Hispanics and 30.1 percent of women had experienced discrimination. Asians report the most frequent occurrence of discrimination in interviewing with pre-selection committees, where 23.4 percent of firms said they had experienced discrimination.

[126] We mailed out a total of 3,301 personal/professional services surveys.

Table 5.6

PROFESSIONAL SERVICE FIRM RESPONDENTS WHO INDICATED THAT THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

(Valid number of responses in parentheses)

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	48.28% (58)	40.63% (32)	18.06% (72)	28.17% (142)
Applying for commercial insurance	45.45% (55)	38.71% (31)	18.06% (72)	27.66% (141)
Attempting to hire qualified workers	46.43% (56)	36.67% (30)	18.06% (72)	28.17% (142)
Obtaining quotes from suppliers	45.45% (55)	40.63% (32)	18.06% (72)	27.14% (140)
Receiving Requests for Proposals	51.61% (62)	40.63% (32)	20.27% (74)	30.14% (146)
Receiving Requests for Qualifications	49.15% (59)	38.71% (31)	21.33% (75)	29.66% (145)
Interviewing with pre-selection committee	46.43% (56)	38.71% (31)	23.38% (77)	29.17% (144)
Applying for memoership in professional associations	45.45% (55)	38.71% (31)	20.27% (74)	28.67% (143)
Other dealings with professional associations	44.44% (54)	40.63% (32)	20.27% (74)	29.17% (144)
PRIME CONTRACTS:				
Bidding on prime contracts [in total]	46.43% (56)	36.67% (30)	23.38% (77)	27.66% (141)
Working on prime contracts [in total]	43.40% (53)	36.67% (30)	23.38% (77)	26.62% (139)
Receiving payments for prime contracts [in total]	42.31% (52)	34.48% (29)	18.06% (72)	25.55% (137)
SUBCONTRACTS:				
Bidding on subcontracts [in total]	48.28% (58)	36.67% (30)	22.37% (76)	28.17% (142)
Working on subcontracts [in total]	42.31% (52)	36.67% (30)	21.33% (75)	25.55% (137)
Receiving payment for subcontracts [in total]	43.40% (53)	36.67% (30)	19.18% (73)	26.09% (138)

Table 5.6a

PROFESSIONAL SERVICE FIRM RESPONDENTS WHO INDICATED THAT THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	61.54% (26)	38.10% (21)	26.32% (38)	31.88% (69)
Applying for commercial insurance	56.52% (23)	35.00% (20)	24.32% (37)	30.88% (68)
Attempting to hire qualified workers	60.00% (25)	35.00% (20)	24.32% (37)	31.88% (69)
Obtaining quotes from suppliers	56.52% (23)	38.19% (21)	22.22% (36)	29.85% (67)
Receiving Requests for Proposals	64.29% (28)	35.00% (20)	24.32% (37)	33.80% (71)
Receiving Requests for Qualifications	60.00% (25)	35.00% (20)	24.32% (37)	32.86% (70)
Interviewing with pre-selection committee	58.33% (24)	35.00% (20)	28.21% (39)	32.86% (70)
Applying for membership in professional associations	58.33% (24)	35.00% (20)	24.32% (37)	31.88% (69)
Other dealings with professional associations	58.33% (24)	38.10% (21)	26.32% (38)	31.88% (69)
PRIME CONTRACTS:				
Bidding on prime contracts [in total]	60.00% (25)	31.58% (19)	28.21% (39)	29.85% (67)
Working on prime contracts [in total]	54.55% (22)	31.58% (19)	28.21% (39)	27.69% (65)
Receiving payments for prime contracts [in total]	54.55% (22)	31.58% (19)	24.32% (37)	27.69% (65)
SUBCONTRACTS:				
Bidding on subcontracts [in total]	62.96% (27)	35.00% (20)	30.00% (40)	30.38% (68)
Working on subcontracts [in total]	52.38% (21)	35.00% (20)	28.21% (39)	25.56% (64)
Receiving payment for subcontracts [in total]	52.38% (21)	35.00% (20)	26.32% (38)	26.56% (64)

Table 5.7 summarizes the survey responses concerning bid requirements which made awards difficult to obtain for professional services firms. Obtaining working capital was perceived as a bid impediment by 64.1 percent of African Americans and 61.3 percent found that the selection criteria made it difficult or impossible to obtain an award. Large project size was perceived as serious obstacles for Hispanics, Asians and women: 63.0 percent of Hispanics, 69.6 percent of Asians, and 55.2 percent of women reported this requirement to be a serious impediment. Tables 5.6a and 5.7a show similar survey responses for those M/WBE services firms which have had dealings with the RTA member agencies.

3. Purchasing Survey

Of the 1,170 commodity purchasing firms that were surveyed, we received responses from 114 firms (10 percent). Over one-third of the respondents reported at least one instance of discrimination. As is the case with the two other surveys, Table 5.2 shows that African Americans reported the highest overall rate of discrimination (54.6 percent), followed by women (46.8 percent), Asians (20.7 percent) and Hispanics (15.4 percent). There is limited evidence of discrimination for the other race/ethnic groups.[127] Table 5.8 summarizes the business dealings in which M/WBE commodity firms reported discrimination. More than half of the African American respondents, and nearly one-third of the female respondents, reported at least one instance of discrimination for each of the business dealings. In each of the business dealings, 15.4 percent of Hispanic and 20.7 percent of Asian firms reported instances of discrimination.

[127] We received only three valid responses from Native American commodity firm owners.

Table 5.7

PROFESSIONAL SERVICE FIRM RESPONDENTS WHO INDICATED THAT BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

(Valid number of responses in parentheses)

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Selection Criteria	61.29% (31)	50.00% (20)	46.88% (32)	37.70% (61)
Insurance Requirements	51.35% (37)	56.00% (25)	45.24% (42)	42.68% (82)
Project Size	55.26% (38)	62.96% (27)	69.57% (46)	55.17% (87)
Cost of Completing Proposals	51.35% (37)	44.44% (27)	59.52% (42)	48.84% (86)
Obtaining Working Capital	64.10% (39)	52.17% (23)	34.88% (43)	24.39% (82)
Notification Deadlines (for bids)	33.33% (36)	38.46% (26)	34.21% (38)	25.29% (87)
Prequalification Requirements	48.57% (35)	38.46% (26)	52.38% (42)	32.50% (80)
Previous Dealings with Agency	24.14% (29)	14.29% (14)	24.14% (29)	23.08% (65)

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Table 5.7a

PROFESSIONAL SERVICE FIRM RESPONDENTS WHO INDICATED THAT BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Selection Criteria	41.67% (36)	33.33% (24)	30.23% (43)	24.10% (83)
Insurance Requirements	30.55% (36)	33.33% (24)	37.21% (43)	28.92% (83)
Project Size	41.67% (36)	41.67% (24)	62.79% (43)	42.17% (83)
Cost of Completing Proposals	41.67% (36)	33.33% (24)	46.51% (43)	37.34% (83)
Obtaining Working Capital	44.44% (36)	33.33% (24)	30.23% (43)	15.66% (83)
Notification Deadlines (for bids)	19.44% (36)	33.33% (24)	27.91% (43)	18.07% (83)
Prequalification Requirements	33.33% (36)	25.00% (24)	41.86% (43)	22.89% (83)
Previous Dealings with Agency	11.11% (36)	8.33% (24)	11.63% (43)	16.87% (83)

Table 5.8

COMMODITY FIRM RESPONDENTS WHO INDICATED THAT
THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

(Valid number of responses in parentheses)

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	54.55% (11)	15.38% (13)	20.69% (29)	32.20% (59)
Applying for commercial insurance	54.55% (11)	15.38% (13)	20.69% (29)	31.03% (58)
Applying for distributorship rights or licenses	54.55% (11)	15.38% (13)	20.69% (29)	29.82% (57)
Attempting to hire qualified workers	54.55% (11)	15.38% (13)	20.69% (29)	29.82% (57)
Attempting to secure placement on other bidder lists	54.55% (11)	15.38% (13)	20.69% (29)	31.03% (58)
Attempting to secure other PO/BPOs	50.00% (10)	15.38% (13)	20.69% (29)	29.82% (57)
Receiving information on goods to be procured	54.55% (11)	15.38% (13)	20.69% (29)	31.03% (58)
Receiving quotes from manufacturers	54.55% (11)	15.38% (13)	20.69% (29)	32.20% (59)
Purchasing goods from manufacturers	54.55% (11)	15.38% (13)	20.69% (29)	32.20% (59)
Receiving volume discounts from manufacturers	54.55% (11)	15.38% (13)	20.69% (29)	32.20% (59)
Receiving lines of credit from manufacturers	54.55% (11)	15.38% (13)	20.69% (29)	33.33% (60)
Receiving payment for goods sold	54.55% (11)	15.38% (13)	20.69% (29)	32.20% (59)

Table 5.8a

COMMODITY FIRM RESPONDENTS WHO INDICATED THAT THEY HAD EXPERIENCED AT LEAST ONE INSTANCE OF DISCRIMINATION

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Business Dealing	African American	Hispanic	Asian	Total WBEs
Applying for commercial loans	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Applying for commercial insurance	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Applying for distributorship rights or licenses	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Attempting to hire qualified workers	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Attempting to secure placement on other bidder lists	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Attempting to secure other PO/BPOs	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Receiving information on goods to be procured	0.00% (4)	16.67% (6)	26.67% (15)	25.00% (20)
Receiving quotes from manufacturers	0.00% (4)	16.67% (6)	26.67% (15)	28.57% (21)
Purchasing goods from manufacturers	0.00% (4)	16.67% (6)	26.67% (15)	28.57% (21)
Receiving volume discounts from manufacturers	0.00% (4)	16.67% (6)	26.67% (15)	28.57% (21)
Receiving lines of credit from manufacturers	0.00% (4)	16.67% (6)	26.67% (15)	28.57% (21)
Receiving payment for goods sold	0.00% (4)	16.67% (6)	26.67% (15)	28.57% (21)

Finally, Table 5.9 summarizes responses concerning bid requirements which made it difficult to obtain awards for commodity firms. Two-thirds of African Americans reported distributorship requirements to be a bid impediment while one-half said that credit requirements, large purchase orders (POs) and blanket purchase orders (BPOs) and notification deadlines created difficulty. The cost of fulfilling POs and BPOs was the most often mentioned difficulty for Asians (31.3 percent), while 33 percent of Hispanics and 50 percent of women report notification deadlines (for procurement opportunities and PO/BPOs) as causing difficulties in obtaining awards. Tables 5.8a and 5.9a show similar survey responses for those M/WBE firms which have had dealings with the RTA member agencies.

G. Evidence from Other Studies and Newspaper Accounts

As indicated above, spurred by continued concern over racial discrimination, governments have sponsored a number of studies regarding discrimination since the early 1980s. Relevant studies have been commissioned by local, state and federal agencies as well as by concerned minority organizations. In addition, discrimination continues to be an area of interest for academics. Consequently, the academic literature also provides some relevant material.

The Community Credit Needs Assessment prepared in 1989 for two City of Oakland agencies provides evidence of discrimination by financial institutions, principally in the form of redlining. According to the study, banks and other lending institutions are reluctant to make loans to businesses located in specific, predominantly minority areas of Oakland. The report also found that small businesses, in general, face serious obstacles in the financial market.[128]

[128] Rosen, 1989.

Table 5.9

Table 5.9

COMMODITY FIRM RESPONDENTS WHO INDICATED THAT
BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

(Valid number of responses in parentheses)

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Credit Requirements	50.00% (6)	11.11% (9)	6.67% (15)	21.43% (28)
Distributorship Requirements	66.67% (3)	12.50% (8)	13.33% (15)	25.00% (24)
Insurance Requirements	20.00% (5)	22.22% (9)	12.50% (16)	21.43% (28)
Large PO/BPOs	50.00% (4)	25.00% (8)	18.75% (16)	30.77% (26)
Cost of Fulfilling PO/BPOs	40.00% (5)	25.00% (8)	31.25% (16)	34.62% (26)
Obtaining Working Capital	40.00% (5)	28.57% (7)	18.75% (16)	37.50% (24)
Notification Deadlines (for procurement opportunities and PO/BPO requirements)	50.00% (6)	33.33% (9)	27.78% (18)	50.00% (30)
Previous Dealings with Agency	25.00% (4)	20.00% (5)	18.75% (16)	26.92% (26)

Table 5.9a

COMMODITY FIRM RESPONDENTS WHO INDICATED THAT BID REQUIREMENTS MADE IT HARDER OR IMPOSSIBLE TO OBTAIN AN AWARD

FIRMS WHICH HAD DEALINGS WITH RTA AGENCIES

Bid Requirement	African American	Hispanic	Asian	Total WBEs
Credit Requirements	25.00% (4)	0.00% (7)	6.67% (15)	8.33% (24)
Distributorship Requirements	25.00% (4)	0.00% (7)	13.33% (15)	16.67% (24)
Insurance Requirements	0.00% (4)	14.29% (7)	13.33% (15)	8.33% (24)
Large PO/BPOs	25.00% (4)	14.29% (7)	20.00% (15)	16.67% (24)
Cost of Fulfilling PO/BPOs	0.00% (4)	14.29% (7)	26.67% (15)	20.83% (24)
Obtaining Working Capital	0.00% (4)	14.29% (7)	13.33% (15)	8.33% (24)
Notification Deadlines (for procurement opportunities and PO/BPO requirements)	25.00% (4)	28.57% (7)	33.33% (15)	29.17% (24)
Previous Dealings with Agency	25.00% (4)	0.00% (7)	20.00% (15)	20.83% (5)

Concerned minority groups have also sponsored their own studies to document discrimination. For example, the Northern California Minority and Women Dump Truck Brokers and Dump Truck Owner/Operators and Freight Carriers Network commissioned a survey of the California Department of Transportation (CalTrans) prime construction contracts for calendar year 1990 in northern California.[129] The study indicated that CalTrans had awarded over $69 million to certified M/WBE firms as subcontractors, representing 7 percent of contract awards. Martin Dinkins, a private consultant who conducted the study, was concerned that white women-owned businesses had a disproportionate share of these M/WBE contracts noting that women-owned firms accounted for 583 of 964 M/WBE subcontracts or 60 percent. Also, of the women-owned firms, 482 were white women-owned firms, this represents full 50 percent of the M/WBE subcontracts. A study sponsored by the San Francisco Human Rights Commission also found bonding and financing among small minority businesses to be the most difficult problems.[130] According to the report, 50 percent of minority and women-owned firms responding to a survey identified bonding and financing as a serious obstacle.[131] In fact, the key recommendation of the study's author involved the establishment of a special revolving fund to provide short-term loans to qualified M/WBEs.

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[129] Martin Dinkins, "Market Place Survey," prepared for the Northern California Minority and Women Dump Truck Brokers and Dump Truck Owner/Operators and Freight Carriers Network, 1991.

[130] Hernandez, 1985.

[131] Note that only 8 firms out of 20 indicated that they had forfeited or not been able to accept a contract because of bonding/financing/insurance requirements. The study's author, however, did observe that many more firms have simply foregone bidding because of these requirements.

The California Public Utility Commission has also been concerned about discrimination in public utility contracting. There is, in fact, a Commission Order (General Order 156) which requires public utilities to "make good faith efforts to hire minority contractors." A study by John James documented the low utilization of minority firms by public utilities in the State.

Alameda and Contra Costa Counties and the City of Hayward have recently sponsored Croson disparity studies.[132] Both studies found notable statistical disparities between the utilization and availability of minority and women-owned firms. These findings are particularly relevant to the RTA member agencies because their geographic market areas largely coincide with those of the RTA agencies.

The City and County of San Francisco and the City of San Jose have also sponsored Croson disparity studies similar to this in the past two years. Both studies found substantial statistical disparities in the utilization and availability of minority and woman-owned firms. These studies are also very relevant as they cover areas incorporated in the RTA agencies' geographic market. San Francisco established an affirmative action program on the basis of its study results which is now under court challenge. San Jose has only partially implemented a program in light of its study results. A M/WBE construction program has been implemented, and programs for professional services and commodities will be implemented when the relevant portions of the disparity study are complete.

The federal government has also continued to study discrimination. For example, a report by the Congressional task force on minority set-asides reports evidence of

[132] National Economic Research Associates, et al., "The Utilization of Minority and Women-Owned Business Enterprises by Alameda County," May, 1992, "The Utilization of Minority and Women-Owned Business Enterprises by Contra Costa County," June, 1992, and "The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward," March, 1993.

discrimination against women.[133] It cites the National Association of Women Business Owners (NAWBO) on the issue of discrimination in obtaining credit: "commercial credit is one area where discrimination is still rampant." A 1985 poll of NAWBO's membership revealed that two out of every five respondents felt that they had been a victim of discrimination when applying for commercial credit.

The Small Business Administration (SBA) has also studied the plight of small minority businesses. An SBA study found that African Americans face outright discrimination by financial institutions; however, there was no significant discrimination shown against Asian and Hispanic businesses.[134]

There are also some notable academic studies on discrimination. For example, Donohue and Heckman, economists at Northwestern University and the University of Chicago respectively, recently surveyed the evidence regarding the cause of improvements in the economic status of African Americans.[135] They determined that a variety of factors contributed to the observed improvement and that these factors varied over time and by region. Donohue and Heckman also concluded that evidence regarding the impact of contract compliance policy demonstrates that such a policy has had a positive effect on African American employment, but that studies to date have not controlled for other factors such as relative wages and relative employment sufficiently to estimate the magnitude of this effect.

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[133] U.S. Congress, Report of Congressional Task Force on Minority Set-Asides, September 8, 1988.

[134] U.S. Small Business Administration, The State of Small Business: A Report of the President, op. cit.

[135] John J. Donohue III and James Heckman, "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks," Journal of Economic Literature, Vol. XXIX, (December, 1991), pp. 1603-1643.

Consequently, it is difficult to quantify the magnitude of the impact. In addition, a number of academic studies have, for example, concluded that discrimination in employment can seriously impede minorities and women from gaining the experience necessary for establishing successful businesses. Minorities and women who are denied employment in particular industries will probably never operate businesses in those industries; they may also be less well-represented in industries because they lack the social contacts that can prove important to gaining employment.[136] Academics have also recently reexamined the degree of discrimination in employment. Researchers at the Urban Institute concluded that, "...[our study] demonstrates that unequal treatment of African American jobseekers is entrenched and widespread."[137]

Unequal treatment of African American job seekers was also observed in a recent study by Kletzer of Williams College.[138] Using nationwide Census data on worker displacement, Kletzer found that white men were more likely to regain employment in a similar industrial or occupational group than African American men. According to the Census, 29.3 percent of African American men were rehired in the same occupation compared to 37.2 percent for whites.[139]

Academics have also frequently studied the role of unions as an obstacle to minority advancement. The basic conclusion has been that construction unions, which often act as

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[136] See Williams (1981), Foster and Strauss (1972), Braddock and McPartland.

[137] Margery Austin Turner, et. al., "Opportunities Denied, Opportunities Diminished: Discrimination in Hiring," The Urban Institute: Washington, D.C., 1991.

[138] Lori G. Kletzer, "Job Displacement, 1979-86: How Blacks Fared Relative to Whites," Monthly Labor Review, July 1991, pp. 17-25.

[139] Ibid. p. 22.

hiring halls for unionized construction firms, have long denied employment opportunities to African Americans.[140]

Discrimination in purchasing has been the subject of academic research as well. A recent study reported in the Harvard Law Review, for example, found that women and minorities were discriminated against by new car dealers.[141] The study found that white women on average pay several hundred dollars more for a car than white men and that African American men pay an even greater premium.

Finally, academics have also addressed distinctions between the various racial and ethnic groups typically defined as minorities.[142] Farley, of the University of Michigan, used 1980 U.S. Census data on racial and ethnic status, earnings, education and marital status, age, and location to study whether earnings differences were attributable to race and ethnic status. He determined that nonwhite minority earnings were lower than white earnings even controlling for education, age and other factors. This finding held for African Americans, Hispanics, Asians (defined as Chinese and Japanese) and Native Americans. Farley observed

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[140] Labor unions have historically practiced discrimination. For example, the American Federation of Labor is said to have been instrumental in driving African Americans out of employment as craftsmen by the early twentieth century; at the time of the Civil War, African American craftsmen outnumbered whites by a margin of five to one. It is argued that discrimination has persisted through to the present. See Bradley Schiller, The Economics of Poverty and Discrimination, Chapter 11; Bureau of Labor Statistics, A Brief History of the American Labor Movement, 1970, pp. 61-64; Howard Foster and George Strauss, "Labor Problems in Construction: A Review," Industrial Relations, October, 1972; and Steve Askin, "Blood, Sweat and Steel," Black Enterprise, May 1984. Also, Edmund Newton describes how construction unions manipulate the hiring process to bypass minorities by keeping them uninformed of work opportunities in "Steel: The Union Fiefdom," Black Enterprise, May, 1984.

[141] Ian Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations," Harvard Law Review, Vol. 104, No. 1, February 1991, pp. 317-872.

[142] See, for example, Reynolds Farley, "Blacks, Hispanics, and White Ethnic Groups: Are Blacks Uniquely Disadvantaged?" American Economic Review, Vol. 80, No. 2, pp. 237-241, 1991.

that "it is impossible to demonstrate discrimination using Census samples, but these numbers imply that if a specific set of characteristics were possessed by Hispanics or racial minorities, they were less rewarded than if they were possessed by white ethnic groups."[143]

H. Conclusions

The anecdotal evidence reviewed indicates that minority and woman-owned firms in the geographic market from which the RTA member agencies draw their contractors strongly believe that they are often victims of discrimination. Among these firms, African Americans have been most vocal as documented by the racial composition of the public hearings and the measurement of discrimination severity in the survey responses. Hard evidence of actual discrimination is harder to find from these sources. For this type of evidence we must look, in addition to statistical evidence, to court decisions where acts of discrimination have been established. As described in section E, there have been numerous such cases in the Bay Area over approximately the last decade.

The anecdotal evidence also reveals the principal sources and impacts of race and gender discrimination. Bonding and financial problems are the most common obstacles found in all of the sources reviewed. Other problems such as certification and impediments in the bidding process as well as the "old boy" network and slow pay were also frequently noted. Table 5.10 summarizes the anecdotal evidence of discrimination established through the various data-gathering efforts made during the course of this study. These findings serve not

[143] Ibid, p. 240.

only to buttress the statistical disparity findings, they also point to areas which must be addressed in order to improve conditions for minority and women-owned firms.

Table 5.10

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SUMMARY OF ANECDOTAL EVIDENCE OF DISCRIMINATION
AGAINST MINORITIES AND WOMEN

Discrimination By:	Hearings/Interviews	M/WBE Surveys	Court Cases	Academic and Other Studies
Prime Contractors	41% of the witnesses testified to discrimination by prime contractors; 31% reported problems with overcoming established "old boy networks". Witnesses at other recent hearings also frequently named prime contractors as the source of discrimination.	All M/WBE groups responding to this question reported discrimination by prime contractors. For example, 50% of African American construction firms reported discrimination by primes.		Academic studies found discriminatory hiring practices among prime contractors
Bonding/Surety Firms	49% of the witnesses identified bonding firms as a serious obstacle. This was also a frequent claim by witnesses at the recent hearings conducted in the Bay Area.	Almost half of respondents in the construction industry claimed discrimination in bonding		
Banks and other financial institutions	44% of the witnesses reported difficulty in obtaining financing from banks. This is consistent with testimony at other recent hearings.	Over 30% of construction firm respondents claimed discrimination by financial institutions		Studies conducted in both San Francisco and Oakland and by the U.S. Government point to discrimination by financial institutions.
Suppliers	Although none of the witnesses at the hearings for the RTA named suppliers, witnesses at other hearings in the RTA's geographic market have reported discrimination by suppliers.	All M/WBE groups claimed some discrimination by suppliers. For example, 36% of WBEs reported supplier discrimination		Recent academic studies have found minorities and women pay more for goods
Unions/Trade	31% of the witnesses testified about problems with and within unions. This is supported by testimony of witnesses at other hearings	All M/WBE groups frequently claimed discrimination by unions and professional organizations	There have been numerous successful lawsuits against unions regarding discrimination in the Bay Area	Academic studies have chronicled union discrimination

CHAPTER 6
METHODS FOR REMEDYING DISCRIMINATION

This chapter discusses and evaluates race/gender-neutral remedies in light of the considerations suggested by Croson. In the first Section, we present a framework for determining the appropriate remedy for particular forms of discrimination and explain why purely race/gender-neutral remedies could not effectively remedy the forms of discrimination we have identified in the previous chapters. In the second Section, we address the limits of

race/gender-neutral programs. In the third Section, we outline several types of race/gender conscious programs which might be considered by the RTA Agencies.

A. Framework for Evaluating Alternative Remedies

In fashioning remedies for discrimination, we will find it useful to distinguish the type of discrimination and proximity of discrimination to the state or local agency seeking a remedy. Discrimination could arise from disparate impact — the neutral application of criteria that minorities and women lack disproportionately — and disparate treatment — the application of different criteria to minorities and women than to similarly situated white men. This discrimination could arise from the state or local agency itself (e.g., its procurement officers), from parties with which it deals directly (e.g., general contractors), and from third parties in the marketplace (e.g., banks). These distinctions are important in determining whether race/gender-neutral, legal sanctions or race/gender-conscious remedies are most appropriate.

B. Race/Gender-Neutral Remedies

Race/gender-neutral remedies are most appropriate for valid business practices that have a disparate impact on M/WBEs. All small and new firms, for example, have difficulty obtaining bonding, working capital and a track record. M/WBEs are more likely to experience these difficulties than non-M/WBEs because they are more likely to be small and new than are non-M/WBEs, not necessarily because they experience race or gender discrimination. Programs that help small businesses, new businesses or disadvantaged businesses alleviate the disparate impact of valid business practices, such as bonding requirements, on M/WBEs.

There are certain situations in which race/gender-neutral measures appear to be the least restrictive and most appropriate remedy. The efficacy and practicality of these measures often become more dubious on closer inspection, however. For example, the obvious remedy for requirements that have a disparate impact on M/WBEs is to eliminate these requirements. But this race/gender-neutral remedy can be problematic. First, some requirements may be mandated by state or federal law and thus not within the purview of the agency to modify or eliminate.[144] Most of the bidding and bonding requirements for the RTA agencies are prescribed by state law. Second, some requirements — such as bonding — may be based on valid business reasons. But the disparate impact of such requirements may arise from the disparate treatment of M/WBEs by second or third parties. Bonding requirements, for example, may have a disparate impact on M/WBEs because of disparate treatment by sureties. Agency awards would therefore be tainted by the secondary effects of such discrimination.

Table 6.1 reviews a range of race/gender-neutral solutions to the various obstacles M/WBEs encounter as a result of disparate impact rather than disparate treatment. The table is organized into five categories reflecting the most common obstacles encountered by M/WBEs, according to the evidence presented in Chapter 5—i.e., bonding, information access, financing, training deficiencies, and competition from large firms. Some of these obstacles are more frequently encountered in certain industries. Bonding and financing, for example, are more often a problem for construction firms. As shown in the table, although race/gender-neutral programs take many forms, they almost all face serious limits. Efforts to reduce

[144] See Coral Construction Co. v. King County, 729 F.Supp. 734 (W.D. Wash. 1990), aff'd, in relevant part, U.S. App. Lexis No. 17784 (9th Cir. 1991) (race-neutral methods not available because of state bidding laws).

bonding obstacles, for example, may be limited by law or too costly to implement. Direct subsidies of bond payments for small businesses may be very expensive. Other race/gender-neutral efforts, such as more carefully structuring contracts to limit or eliminate bonding requirements, may be burdensome and are not clearly effective.

C. Sanctions as a Remedy

Another obvious remedy is to impose sanctions on those who discriminate. Although the applicability of civil rights statutes to the subcontracting relationship may be uncertain, subcontractors who could prove discrimination would have some cause of action, if only under a general contract or tort theory. Nonetheless, such potential legal liability has not prevented or remedied the discrimination identified by this study. As discussed above, it is extremely difficult to prove that discrimination occurred in an individual rejection by a prime contractor of an M/WBE subcontractor's bid. Even though there is evidence of a pattern of discrimination of this sort, such evidence would not assist a particular subcontractor challenging the actions of a particular prime contractor. Moreover, the potential remedy—profit on the lost opportunity—would seldom justify the expense of this kind of litigation. We found no examples in which such litigation has been successfully pursued, and only a few instances in which it had been attempted.[145]

A further problem with imposing sanctions is that any particular state or local agency has, at best, a limited ability to expand the scope of sanctions to those areas in which discrimination may affect its procurement decisions. While an agency might impose penalties

[145] It might still be worthwhile to create additional civil remedies for discrimination in subcontracting on public contracts. Such remedies might be useful to a few subcontractors and might lead to records that would be useful in the future.

(e.g., debarment) on contractors that engage in discrimination, it would not have the authority or ability to impose penalties on secondary parties such as banks, unions, suppliers and bonding companies whose discrimination raises the costs of M/WBEs that currently bid on agency procurements or would do so in the absence of discrimination.

If sanctions are not feasible, then race/gender-conscious preferences of some sort may be the only method for ensuring that a state or local agency does not participate indirectly in discrimination by its contractors or secondary parties. There is no race/gender-neutral method for ensuring that non-M/WBE prime contractors cease discrimination by refusing to deal with M/WBE subcontractors. Likewise, there is no effective race/gender-neutral method for offsetting the higher costs incurred by M/WBE contractors as a result of disparate treatment by suppliers such as banks, bonding companies, unions and manufacturers. Where disparate treatment is tied to race or gender, the only effective remedy is one that is tied to race or gender.

The preceding discussion indicates that race/gender-neutral programs may be of limited use because: (1) there are good reasons to expect they are not particularly effective, (2) their effectiveness is often unknown and (3) they will be expensive to implement. Perhaps, most importantly, we have found underutilization of M/WBEs and anecdotal evidence of discrimination despite the implementation of both race/gender-neutral and race/gender-conscious programs within the geographic market areas and industries relevant to the RTA agencies.

D. Race/Gender-Conscious Award Preferences

As noted above, race/gender-neutral programs alone have not eliminated the underutilization of M/WBEs within the geographic areas of the RTA agencies nor has it eliminated discrimination as shown by the clear anecdotal evidence. Thus, race/gender-conscious programs must be considered by the RTA agencies.

All of the RTA agencies have race/gender-conscious programs for federally funded projects. These programs are generally mandated by federal regulations as a condition of receiving federal grant funds. These programs are based upon the establishment of an overall DBE goal as well as the setting of individual contract goals on a case-by-case basis. These programs also involve establishment of a good faith effort provision and include detailed federally mandated implementation and enforcement procedures. Thus, the existing federal race/gender-conscious programs may provide a useful model for RTA agencies to consider when seeking to remedy discrimination in nonfederally funded contracts.

In addition however there are other race/gender-conscious programs which have been used by other agencies in other parts of the country. The following list of such programs is not intended to be exclusive. Implementation of any of the following race/gender-conscious programs should only be undertaken after careful legal analysis by each RTA agency's legal counsel. In addition, care must be taken to ensure that any race/gender-conscious program adopted which is also intended to be applicable to federally funded programs, is permitted under the applicable federal regulations. RTA agencies may also want to consider the administrative difficulties inherent in adopting markedly different programs for federally and

nonfederally funded projects. Finally, any increased costs to the agencies in implementing such programs should be weighed.

1. Bid Preference Program for M/WBEs on Prime Contracts

Such a program could involve granting additional points to a M/WBE contractor who submits a proposal or bid on a services, procurement, or construction contract. The possibly increased costs of this type of program must be carefully considered as well as legal considerations in light of statutorily mandated competitive bidding laws and State and Federal constitutional requirements.

2. Bid Preference Program for Prime Contractors Who Include a Specified Level of M/WBE Participation

This type of program would not be aimed at prime contractors but rather at subcontractor participation. Again, the same cost and legal issues must be carefully considered.

3. M/WBE Set Aside Programs

These types of programs can come in several different forms. They may require that certain types of work (and the contracts for that work) only be awarded to M/WBEs. Alternatively, a contract could include an absolute percentage of subcontracting that again can only be given to M/WBEs. Both of these set aside type programs are highly controversial and will require very careful legal analysis to determine whether the particular RTA agency can implement such a program under competitive bidding laws and State and Federal constitutional standards. Increased costs may also be a factor.

4. Financial Assistance to M/WBEs

These types of programs may include bonding assistance, technical assistance, or other types of financial assistance. Such programs might enable prime contractors who are M/WBEs to compete more effectively. Where offered to assist subcontracting activities, such programs might enable majority prime contractors to maximize use of M/WBEs and remain competitive. The nature and costs of such programs would have to be carefully considered and again legal considerations involving competitive bidding and State and Federal constitutional issues would have to be carefully analyzed. These types of programs should be distinguished from race/gender-neutral types of bonding and technical assistance programs which are not based on race/gender-conscious considerations.

5. Strengthening Good Faith Efforts Criteria

The good faith efforts provisions of goals-based contracts could be strengthened so that prime contractors must make greater efforts to include participation by M/WBEs. As an example, good faith provisions currently used in federally funded procurements could be revised to require that additional steps be taken where a goal is not met and/or to attach a point value to each of the steps required and establish a minimum pass/fail total. Any changes to the good faith efforts requirement should be carefully analyzed to ensure than they are legally sufficient and permissible under applicable federal regulations if such changes are to be included in federally funded programs.

6. Increased Efforts on M/WBE Outreach and Technical Assistance Program

Agencies could consider increasing the level of outreach currently made available to M/WBEs as well as prime contractors. In addition, prime contractors could be required to

utilize technical assistance services provided by the agency to increase M/WBE participation. Obviously, the increased cost to the individual agencies must be carefully considered prior to adopting this type of program. In addition, the effectiveness of such a program would need to be carefully considered.

7. M/WBE Incentive Payment

As an incentive to achieving a specified level of M/WBE subcontractor participation, a prime is awarded compensation for locating, selecting, training, assisting and developing the M/WBE subcontractors. The compensation is based upon a specified percentage of the value of the work subcontracted to M/WBEs and can be paid in installments at the beginning of the contract and following completion of the contract. Alternatively, prime contractors can be offered opportunities for time extensions in lieu of monetary compensation. Such a program has been used by the Federal Lands Highway Program. Again, such a program would require careful analysis as to legal constraints as well as costs to the implementing agency.

Based upon the evidence of discrimination and under utilization found in this study, it would certainly be reasonable for the RTA Agencies to extend the types of race/gender-conscious programs developed for federally funded projects to nonfederally funded projects. In addition, it may be appropriate for individual RTA Agencies to utilize other race/gender-conscious programs similar to those described above. The appropriateness of a particular type of program must be determined by the agency itself based upon its own particular contracting needs and opportunities as well as its administrative and financial resources. Many of the race/gender-conscious programs identified above could increase the costs of services and goods to the individual agencies. In addition, it is clear that the legal viability of race/gender-

conscious programs is continuing to develop in State and Federal courts and will do so for some years to come. Thus, the legal risks inherent in the adoption of any race conscious program must be carefully considered.

Table 6.1
REVIEW OF RACE-NEUTRAL SOLUTIONS TO EXPANDING MINORITY BUSINESS OPPORTUNITIES

BONDING AS AN OBSTACLE

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Reduce bonding requirements for bids under specified dollar value.	Require bonding at levels commensurate with risk to the owner.	State and local laws.
Break contract awards into segments and allow contractor to be bonded on one segment at a time.	Allow contractor to complete each segment. Apply the Bond to the next segment until work is completed.	Adds complexity and increases administrative burden.
Multiprime contracts. Public agency enters into several different prime contracts rather than entering into a single prime contract.	On certain types of projects, the multiprime approach may discourage bid shopping by primes of M/WBE bids. This approach allows M/WBEs to compete as primes.	May create administrative burdens and increase complexity of project. Cost impact unknown. Fails to fully address bonding and finance oostacles.
Refer to federal, state and local bonding assistance programs.	SBA; DOT Programs; National Minority Supplier Development Council Programs.	Limited funds.
Develop public/private bonding assistance programs.	Provide public funds to contract with a surety firm to provide bonding assistance to small minority and women-owned firms.[1]	Limited funds.

[1] In Philadelphia, CIGNA Corporation operates a bonding assistance program under a contract with the Philadelphia Industrial Development Corporation (PIDC). PIDC funds the contract with Community Development Block Grants. CIGNA subcontracts to Contract Support Systems, Inc. a private minority-owned firm, to provide the bonding assistance to the DBE firms. The bonding assistance includes preparing the financial statements reviewing the contract requirements and otherwise making the DBE firm "bond ready."

Bonding as an Obstacle, continued

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Eliminate bond premiums from bids.	Bidder would not add the cost of its bond premium to its bid. The successful bidder, regardless of its bond premium, would be reimbursed for the cost of its bond with the first progress payment.	Expensive. State and local laws.
Institute bond waivers and direct disbursement procedures.	Waive performance bond on smaller contracts in which DBE firms are more likely to be involved.[2] Under direct disbursement, subcontractors are paid directly by the owner through a third party disbursing agent. Payment bond is no longer necessary.	Legal limits.
Enact a local "Equal Surety Bond Opportunity" Act.	Local agencies can require that surety companies do not discriminate on the basis of race when considering applications for bonds.	Enforcement may be difficult and expensive.

[2] Section 301(b) of Public Law 100-656 Business Opportunity Reform Act of 1988. Under direct disbursement, subcontractors are paid directly by the owner or through a third party disbursing agent. The subcontractor makes application for a progress payment to the prime contractor who approves the amount of payment and includes it in its next payment request to the government agency.

Table 6.1
REVIEW OF RACE-NEUTRAL SOLUTIONS TO EXPANDING MINORITY BUSINESS OPPORTUNITIES

NEED FOR INFORMATION AND ASSISTANCE AS AN OBSTACLE

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Hold focus sessions for specific commodities and/or projects.	These sessions provide information for specific projects. The agency invites those firms capable of providing the goods and/or services. Agency personnel responsible for the project are required to attend and bring all available information about the project or service and be prepared to discuss the requirements and respond to questions.	Effectiveness is difficult to measure.
Require pre-bid conferences for solicitations over a specified dollar value.	This process allows DBE firms to ask questions regarding the product or service and to meet the prime contractors likely to bid.	Effectiveness is difficult to measure.
Reduce sole source transactions.	Sole source bidding eliminates competition in general. Generic specifications may eliminate the need for sole source purchasing except in extraordinary cases.	Effectiveness is difficult to measure.
Develop and distribute Agency newsletters.	Newsletters provide small businesses with the advance notice they need of projects being planned or developed. The lead time gives them the opportunity to seek bonding and financial assistance, if necessary.	Effectiveness is difficult to measure.

Need for Information and Assistance as an Obstacle, continued

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Establish a "1-800" Hotline.	This program requires an 800 number and a dedicated telephone line which can be accessed by vendors and contractors interested in doing business with the agency. Through the use of the hot line, contractors can obtain information on upcoming projects, bid opening dates, pre-bid conferences and successful bidders.	Effectiveness unknown.

Table 6.1
REVIEW OF RACE-NEUTRAL SOLUTIONS TO EXPANDING MINORITY BUSINESS OPPORTUNITIES

NEED FOR FINANCIAL ASSISTANCE AS AN OBSTACLE

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Adopt prompt payment procedures for subcontractors.	The State of California Office of Small and Minority Business has a prompt payment program that assists small businesses in receiving payment from the state. Senate Bill 982, Chapter 91, Statutes of 1982 imposes a fine for late payments to small businesses. The City of Philadelphia requires a prime contractor to pay subcontractors within ten days of receiving payment.[3]	Effectiveness unknown.
Make more frequent payments to contractors.	In addition to prompt payment, state and local governments can improve the cash flow of their contractors by making more frequent payments. Traditionally, payments are made monthly. Biweekly payments, particularly on projects performed by small and emerging firms, dramatically improves the cash flow of such firms.	Effectiveness unknown, may add administrative burden.
Reduce retainage.	Make progress payments in full to the contractor without retention unless it is determined that the contractor is not making timely or otherwise satisfactory progress toward the completion of the contract.[4]	Effectiveness unknown.

[3] The federal government and a few states have addressed the need for prompt payment to subcontractors. As of April 1, 1989, the federal government requires its prime construction contractors to pay their subcontractors within seven days of receiving payment from the government or incur an interest penalty.

[4] Under Office of Federal Procurement Policy Letter 83-1, "Withholding of Funds from Construction Contract Progress Payments," the federal government does not retain funds "without cause." Decisions regarding the use and specific levels of retainage are made on a "case by case basis."

Need for Financial Assistance as an Obstacle, continued

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Loan assistance.	The Business Consortium Fund (BCF) is a minority business development company of the National Minority Supplier Development Council which has several affiliate councils in California. The BCF provides financing to minority businesses through a network of banks and the Regional Purchasing Councils.	Limited funds.

Table 6.1
REVIEW OF RACE-NEUTRAL SOLUTIONS TO EXPANDING MINORITY BUSINESS OPPORTUNITIES

INADEQUATE MANAGEMENT, TRAINING & EDUCATION AS OBSTACLES

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Mentor-protege programs.	The Department of Defense is operating a pilot mentor-protege program that reimburses majority contractors for the costs incurred in training a DBE subcontractor on a Department of Defense contract.	Limited funds.
Joint venture agreements.	Joint venture agreements between a contractor and a DBE allow the small firm to learn from the joint venture partner while experiencing a share of the risk and responsibility associated with the project.	Effectiveness unknown.

Table 6.1
REVIEW OF RACE-NEUTRAL SOLUTIONS TO EXPANDING MINORITY BUSINESS OPPORTUNITIES

COMPETITION FROM LARGE FIRMS AS AN OBSTACLE

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Small business preference programs.	In California, the Office of Small and Minority Businesses administers a preference program for small business vendors and construction subcontractors. Under this program 5 percent of the low bid price is deducted from the bid before it is compared with bids from vendors or construction contractors which are not small businesses.[5]	Expensive.
Develop new types of outreach programs for small, minority and women-owned businesses.	The University of California implemented an "Inreach" program where management and staff of the Office of Small Business Development visited campus departments to raise business affirmative action performance in department-initiated purchasing activities. The University also conducted business brunches to allow small businesses the opportunity to meet informally with University personnel responsible for purchasing activities.	UC-Berkeley has been criticized for underutilization of M/WBEs despite this program.[6]

5 A "small business" is determined according to gross income for various industrial categories.

6 Louis Freedberg, "U.C. Falling Short of Goals for Minority Woman Contractors," San Francisco Chronicle, January 16, 1992, p. A20.

Competition from Large Firms as an Obstacle, continued

RACE-NEUTRAL SOLUTION(S)	EXAMPLES	LIMITATIONS
Referrals to small business assistance programs.	The U.S. Department of Commerce has a network of business development centers to provide assistance to minority businesses in business planning; financial planning; and other business practices.	Effectiveness unknown.
Divide major projects into sub-projects, whenever feasible to allow small businesses a greater opportunity to bid.	This process would minimize the competition from larger firms.	Increased administrative burden.
Require all bidders for prime contracts to demonstrate and document good faith, and affirmative efforts to contact and solicit subcontract bids from small businesses.[7]		This would place the responsibility on the contractor to affirmatively seek bids from small businesses. It does not solve the problem of utilization.

[7] The City of Richmond offered this race-neutral program in response to the Supreme Court's ruling in *City of Richmond v. J. A. Croson Company* which rejected the Richmond plan in part because there was no consideration of these kinds of race-neutral methods for increasing minority participation. A race-sensitive program was adopted for construction contracts.

CHAPTER 7
CONCLUSIONS

This study has evaluated the DBE programs operated by each of the RTA member agencies in light of the Croson decision and related affirmative action cases. The study examined the utilization of M/WBEs by Alameda County, Contra Costa County and the City of Hayward — public agencies located within the RTA's jurisdiction which, in recent years, have undertaken procurements that were not subject to M/WBE goals. We also analyzed M/WBE utilization by the private sector within the geographic areas and industries relevant

to RTA procurements. Finally, we gathered anecdotal evidence of discriminatory treatment and procurement practices experienced by M/WBEs in the RTA's geographic market areas.

The statistical and anecdotal findings strongly support the view that discrimination would lead to the underutilization of M/WBEs by the RTA agencies in the absence of a goals program. In general, the statistical evidence indicates substantial underutilization of M/WBEs by Alameda and Contra Costa Counties and by the City of Hayward in the absence of race-conscious programs. We also found that M/WBEs received a substantially smaller share of private-sector procurement dollars than we would expect given their availability in the geographic market areas and industries from which the RTA agencies procure goods and services. The statistics gathered as part of our study are striking. In each RTA member agency's geographic market, we found tremendous disparities for each major race and gender group—African Americans, Hispanics, Asians (including Native Americans) and women—in each of the major industries we examined—construction, professional and other services, and commodity purchasing. In no case did any group receive their expected share of private-sector procurement dollars. These disparities, however, vary greatly for each M/WBE group and across each agency. In general women-owned construction firms in private-sector subcontracting fared better than the M/WBE groups in any other industry, although substantial disparities still exist for them. Women-owned firms received almost their expected share of construction subcontracting dollars in MUNI's private-sector market; however, they received less than one-third of their expected share in SCCTA's private-sector market. Overall, the most substantial underutilization was for African American commodity vendors—they received less than 3.5 cents of every procurement dollar in purchasing than we

would have expected them to receive. African Americans were also the most substantially underutilized group as construction prime contractors in the private sector.

The anecdotal evidence provides additional support that marketplace discrimination in the greater Bay Area limits the opportunity for M/WBEs to obtain work. Although the state of California and the Bay Area have a diverse ethnic population and enjoy the reputation as a progressive region, they are not free of racial prejudice. Racial tensions and redlining continue to plague the region. Over one-third of the minority and women business owners in the Bay Area who responded to our M/WBE survey reported that, in the last five years, they have experienced one or more instances of discrimination in the course of business dealings. These statements of discrimination were supported by testimony from the public hearings and telephone interviews with M/WBE owners in the Bay Area.

These perceptions and claims are supported by many court findings, academic work and government research studies that also find that minorities and women who are situated similarly to white males are not treated as well as white males. Reports of racial tension outbursts, and discrimination on the part of financial institutions and real estate agencies appear frequently in the news. In addition, recent court cases have found that discrimination has existed in the Bay Area for a number of years. For example, there were a number of cases regarding discrimination against minorities and women in the local construction trades of the Bay Area. In one case, the court found that discrimination had existed for a number of years and described a consent decree to provide relief from harsh discriminatory practices and for past wrongs. In another Bay Area case, the court found that the local union had violated Title VII by discriminating in the admission of minorities into apprenticeship programs and other

training positions. The discrimination reflected in the construction industry is also reflected in other areas of employment. In an employment discrimination case against the Oakland Scavenger Co., the district court found that the Oakland-based garbage collection company had plainly and severely discriminated against African American and Hispanic employees.

While there is evidence that many kinds of discriminatory practices impede the ability of minorities and women to participate on RTA procurements, there is evidence of particularly serious problems in certain areas and against certain groups:

- Discrimination is an especially virulent problem in the construction industry, as evidenced by court findings and responses to our M/WBE surveys. While obtaining access to commercial loans is a problem in all industries, construction has a number of unique institutions that provide additional avenues for discrimination. The importance of bonding, unions and business networks in the construction industry increases the avenues through which M/WBEs experience the effects of discrimination. Approximately 36 percent of the M/WBE construction firm survey respondents reported at least one instance of discrimination in the last five years. Survey responses, academic studies and testimony indicate that discrimination has existed for a number of years, thus making it difficult for M/WBEs in the construction industry to obtain bonds, work as subcontractors, and qualified labor from union hiring halls.

- Discrimination in obtaining commercial loans is a pervasive problem that affects the ability of minorities and women in all industries to establish and expand their businesses. Over 30 percent of the respondents to our surveys reported at least one instance of discrimination in applying for commercial credit in the last five years. Numerous M/WBEs testified that they were unfairly denied credit. Academic and government research studies continuously find that minorities are less likely to obtain commercial loans than nonminorities with similar financial profiles.

- African Americans appear to encounter the most frequent and the most severe discrimination. Almost 60 percent of the African American respondents to our survey indicated that they had experienced one or more instances of discrimination in the course of business dealings in the last five years. In addition, African Americans were frequently the most

> underutilized of all the M/WBE groups based on our private-sector disparity analysis. The academic, government research studies and court cases we have examined generally show more extensive discrimination for African Americans than for other groups.

The DBE goal programs conducted by each of the RTA member agencies are, therefore, a reasonable remedy for ensuring that RTA procurement spending is not used to help perpetuate discriminatory practices. Were the programs discontinued, we would expect the agencies' utilization of M/WBEs to decrease dramatically. We would recommend, however, some modifications in the design and implementation of the current programs, as we discuss below.

While the statistics divide M/WBEs into four separate categories, we believe race, ethnic and gender groups may be combined for purposes of an overall MBE goal. The overall goal, however, should not include groups for whom there is no evidence of discrimination or demographic presence, and the actual application of the goals should be monitored to assure that all groups obtain an equal opportunity to participate in the program.

Where a small number of M/WBEs satisfy a large share of an agency's utilization goals, other— generally smaller and newer— firms do not enjoy these same opportunities. It is true of both M/WBEs and non-M/WBEs alike that a few firms are often the most aggressive and successful in seeking work on public projects, and a firm presumably cannot long maintain a dominant share of such a competitive market unless it is better or more dedicated than its competitors. Discouraging such qualities might not be in the interest of the member agencies, but a graduation or size limit provision should be considered because these firms may no longer need a race/gender-conscious remedy. Such a size limitation has been viewed favorably by courts analyzing the narrow-tailoring prong of the constitutional issue. The RTA agencies

could also ensure broader participation by encouraging prime contractors to involve more than one or two M/WBE subcontractors when the multiple specialties required for a particular project make this feasible. This would reduce the tendency to rely heavily on a small number of M/WBEs.

In conclusion, the DBE programs operated by the RTA member agencies— the current programs or the ones suspended following Croson— are clearly distinguishable from the program condemned by the Court in Croson. First, the RTA agency programs are based on substantial statistical and anecdotal evidence as required by the Court. Second, the programs provide the degree of flexibility through, for example, the provision of waivers that the Court found necessary. A thorough re-evaluation of the M/WBE program probably should not be necessary for another decade. The agencies might consider a 10-year sunset provision in the program for projects without federal funding. Moreover, much of the RTA member agencies' contracting is subject to federally mandated DBE goals which appear to be permissible under the Fullilove decision.

APPENDIX

SIC LISTING

STANDARD INDUSTRIAL CLASSIFICATION (SIC) — TWO DIGIT INDUSTRY CODES

01 Agricultural production
02 Agricultural production
07 Agricultural Services
08 Forestry
09 Fishing, Hunting, and Trapping
10 Metal Mining
12 Coal Mining
13 Oil and Gas Extraction
14 Mining and Quarrying of Nonmetallic Minerals
15 Building Construction
16 Heavy Construction
17 Construction-Special Trade
20 Food and Kindred Products
21 Tobacco Products
22 Textile Mill Products
23 Apparel and Other Finished Products
24 Lumber and Wood Products, Except Furniture
25 Furniture and Fixtures
26 Paper and Allied Products
27 Printing, Publishing and Allied Industries
28 Chemicals and Allied Products
29 Petroleum Refining and Related Industries
30 Rubber and Miscellaneous Plastics Products
31 Leather and Leather Products
32 Stone, Clay, Glass and Concrete Products
33 Primary Metal Industries
34 Fabricated Metal Products, Except Machinery
35 Industrial and Commercial Machinery and Computer Equipment
36 Electronic and Other Electrical Equipment and Components, Except Computer Equipment
37 Transportation Equipment
38 Measuring, Analyzing, and Controlling Instruments
39 Miscellaneous Manufacturing
40 Railroad Transportation
41 Local and Suburban Transit
42 Motor Freight Transportation and Warehousing
43 United States Postal Service
44 Water Transportation
45 Transportation by Air
46 Pipelines, Except Natural Gas
47 Transportation Services
48 Communications
49 Electric, Gas and Sanitary Services
50 Wholesale Trade-Durable Goods
51 Wholesale Trade-Nondurable Goods
52 Building Materials, Hardware, and Mobile Home Dealers
53 General Merchandise Stores
54 Food Stores
55 Automotive Dealers and Gasoline Service Stations
56 Apparel and Accessory Stores
57 Home Furniture, Furnishings, and Equipment Stores
58 Eating and Drinking Places
59 Miscellaneous Retail
60 Depository Institutions
61 Nondepository Credit Institutions
62 Security and Commodity Brokers, Dealers, Exchanges, and Services
63 Insurance Carriers
64 Insurance Agents, Brokers, and Service
65 Real Estate
67 Holding and Other Investment Offices
70 Hotels, Rooming Houses, Camps, and other lodging
72 Personal Services
73 Business Services
75 Automotive Repair, Services and Parking
76 Miscellaneous Repair Services
78 Motion Pictures
79 Amusement and Recreation Services
80 Health Services
81 Legal Services
82 Educational Services
83 Social Services
84 Museums, Art Galleries, and Botanical and Zoological Gardens
86 Membership Organizations Business, and civic and social associations
87 Engineering, Accounting, Research, Management and Related Services
89 Miscellaneous Services
91 Executive, Legislative, and General Government, Except Finance
92 Justice and Public Order
93 Public Finance, Taxation, and Monetary Policy
94 Administration of Human Resource Programs
95 Administration of Environmental Quality and Housing Programs
96 Administration of Economic Programs
97 National Security and International Affairs
99 Nonclassifiable Establishments

ource U.S Office of Management and Budget, Standard Industrial Classification Manual, 1987

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